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LAW, THE STATE, AND THE INTERNATIONAL COMMUNITY

VOLUME TWO

Extracts Illustrating the Growth of Theories and Principles of Jurisprudence, Government, and The Law of Nations

LAW, THE STATE, AND THE INTERNATIONAL COMMUNITY

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IN TWO VOLUMES

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Extracts Illustrating the Growth of Theories and Principles of Jurisprudence, Government, and The Law of Nations

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JURISPRUDENCE

It is a characteristic of human jurisprudence to be always indefinitely extending, and . . . there is nothing in it which can endure forever, for nature is constantly hastening to bring forth new forms.—Justinian, *Digest,* Second Preface, No. 18.

Begin then, under the direction of God to teach the science of law to students and open to them the way which We have discovered, that they may become excellent ministers of justice and of the State.—*Ibid.,* First Preface.

Justice is the establishment of peace. Justice is the establishment of equality. Justice is the establishment of liberty. Justice is the establishment of equity; and justice is the establishment of truth. In all law, primitive and modern alike, these principles are recognized, and all institutions are organized for these purposes.—J. W. Powell, "On Regimentation," in the 15th Annual Report of the American Bureau of Ethnology (1893–4), p. cxi.

The editions and translations from which the excerpts in the following pages have been quoted are indicated in the Bibliography of Source Materials, *infra*, pp. 354–62. A more detailed acknowledgment is given in the Preface and in the list of acknowledgments printed in Volume I. For the sake of brevity most of the excerpts from Greek and Latin writers are accompanied only by citations of the original texts. In a few instances it has been found advisable, however, to vary this arrangement by citing a well-known translation rather than an original but not readily accessible text.

JURISPRUDENCE

The Nature of Jurisprudence

The science of the law is the acquaintance with Divine and human affairs, the knowledge of what is just and what is unjust.—*Digest* I. i. 10, § 2.

. . . Ulpian quotes with approval the definition of Celsus, namely: "*Ius* is the art of the good and the equitable." For this definition would seem to be suited, not so much to law (*lex*) itself, as to jurisprudence (*iuris prudentiae*).—Francisco Suárez, *De legibus,* Book I, chap. ii, § 8.

. . . Civil jurisprudence is nothing other than an application, or extension, of moral philosophy to the rule and government of the political conduct of the commonwealth; and therefore, in order that [this jurisprudence] may partake somewhat of the essence of true science, it must be joined or subordinated to philosophy.—*Ibid.*, Preface.

. . . Theology . . . takes into consideration the natural law itself in so far as the latter is subordinated to the supernatural order, and derives greater firmness therefrom; whereas it considers the civil laws only by way of determining, according to a higher order of rules, their goodness and rectitude, or by way of declaring, in accordance with the principles of the faith, the obligations of conscience which are derived from the said civil laws. Furthermore, theology recognizes and claims as proper to itself, the sacred canons and the pontifical decrees in so far as they are binding upon the conscience and point the way to eternal salvation. Accordingly, with respect to all of these systems of law, theology conducts a divinely illuminated inquiry into the primary origins and the final ends; that is, it asks in what way the said systems derive their origin from God Himself, in the sense that the power to establish them exists primarily in God, flowing forth to men from Him either by a natural or by a supernatural course, and ever influencing and cooperating with them. Finally, theology clearly reveals the way in which all laws are standards of human action subject to the conscience, and thus reveals also the extent to which they conduce to merit or demerit for eternal life.—*Ibid.*

The law of trade is just; but that of maintaining one's safety is more so. The former is a law of nations, the latter of nature. The former concerns private citizens, the latter kingdoms. Let trade therefore give way to the kingdom, man to nature, money to life. Those are the principles on which legal contests are settled, namely, that one should yield to the worthier, more expedient, and more just law; that the profane should yield to the sacred, the things of the body to those of the spirit, the interests of fortune to those of the person, the law which includes both equity and the natural law to the natural law, that which enjoins the protection of strangers to one which enjoins the protection of our own, that which involves individual advantage to that which involves the public welfare, the strict law to the just one, cases which are not necessary to those which are, that which permits to that which commands and forbids, the new to the old.—Alberico Gentili, *De jure belli,* Book I, chap. xxi.

Right (Ius)

Ius is a general name, containing under it many species.—Gratian, *Decretum,* Part I, dist. i, chap. i, § 1.

Ius is the general term and *lex* is a kind of *ius*. *Ius* is so-called, because it is just (*iustum*). All *ius* is made up of laws and customs.—Isidore, *Etymologies,* Book V, chap. iii, § 1.

A thing can be adjusted to a man in two ways: first by its very nature, as when a man gives so much that he may receive equal value in return, and this is called *natural right*. In another way a thing is adjusted or commensurated to another person, by agreement, or by common consent, when, to wit, a man deems himself satisfied, if he receives so much. This can be done in two days: first by private agreement, as that which is confirmed by an agreement between private individuals; secondly, by public agreement, as when the whole community agrees that something should be deemed as though it were adjusted and commensurated to another person, or when this is decreed by the prince who is placed over the people, and acts in its stead, and this is called positive right.—St. Thomas Aquinas, *Summa theologica* II.–II, qu. 57, art. 2.

Ius sometimes refers to the moral right to acquire or retain something, whether that right involve true dominion or merely a partial dominion; and the said right is, as we learn from St. Thomas (II.–II, qu. 57, art. 1), the true subject-matter of justice.—Suárez, *De legibus,* Book II, chap. xvii, § 2.

Ius sometimes means law, which is the rule of righteous conduct; and in this sense it is that which establishes a certain equity in things.—*Ibid.*

Ius may refer to the equity which is due to each individual as a matter of justice.—*Ibid.*, Book I, chap. ii, § 4.

As St. Thomas holds (II.–II, qu. 57, art. 1, ad 2), it is the expression [of right,] that very acceptation of *ius* which we first noted; but this expression of right is law itself (again according to St. Thomas, *ibid*), and accordingly *ius* is synonymous with law, . . . Therefore, in order that there may be concise terms at our disposal, we may speak of the first sort of *ius* as "equitable" (*ius utile*), and of the second as *ius* in relation to [legal] propriety (*ius honestum*); or we may speak of the former as "real" (*ius reale*), and of the second as "legal" (*ius legale*).

Both kinds of *ius,* then, may be divided into the natural law, the *ius gentium,* and the civil law. For the *ius utile* is called natural when it is granted by or originates within nature, as liberty may be said to spring from the natural law. That *ius* is called civil which has been introduced by civil law—as is the case, for example, with the right of prescription; that which is founded upon the common usage of mankind—as, for example, the right of passage over public highways, or the right to enslave introduced by war—is termed *ius gentium*. In this sense, the threefold division in question relates to the subject-matter of justice.—*Ibid.*, Book II, chap. xvii, § 2.

Ius has two meanings. According to the one, it signifies a moral power of use: and this is ownership or quasi-ownership; for it may include an established right in holding a thing or a right to have a thing and can be called generally a right of ownership or quasi-ownership. In this sense, *ius* refers rather to fact [than to law]. In the second sense, *ius* is a right that carries the power to bind and command: this we may call the right of law, or legal right.—*Ibid.*, Book VII, chap. i, § 9.

No one can transfer to another a right which he himself does not possess. —*Digest* L. xvii. 54.

Usurpation of right does not create a right.—Dante Alighieri, *De monarchia* III. xi. 2.

Law and the Human Being

Let us place man in some public society with others, whether civil or spiritual; and in this case there is no remedy but we must add yet a further law. For although even here likewise the laws of nature and reason be of

necessary use, yet somewhat over and besides them is necessary, namely, human and positive law, together with that law which is of commerce between grand societies, the law of nations, and of nations Christian.—Richard Hooker, *Of the Laws of Ecclesiastical Polity,* I. xvi. 5.

Law is the rule of the moral actions of man, as has often been said; and not only the human community, but also individual men have need of this rule; therefore, law *per se* implies a relationship not with the human community, exclusively, but also with individual human beings.—Suárez, *De legibus,* Book I, chap. vi, § 7.

Law is made with reference to a person, and consequently with reference to a true person, not less than to a fictitious one; but on the contrary much more so, for a fiction always presupposes the truth which it imitates; and a community is a fictitious person, whereas an individual human being is a true person; therefore, an individual person is not less capable [of being the subject] of law than is a community.—*Ibid.*

Law implies a relationship with individual persons, in so far as they are parts of the community upon which the law is imposed as a rule of action, so to speak.—*Ibid.,* § 17.

Ordinarily law is framed for the community not collectively, but distributively, that is to say, framed to the end that it may be observed by each and every member of the community, in the proper distribution, according to the nature of the law; for this provision is always implied.—*Ibid.*

Reason and Law

Reason, the mistress and queen of the world. . . .—Cicero, *Tusculan Disputation,* II. xxi. 47.

Man is a reasoning animal. Therefore, man's highest good is attained, if he has fulfilled the good for which nature designed him at birth. And what is it which this reason demands of him? The easiest thing in the world,—to live in accordance with his own nature.—Seneca, *Epistulae morales* XLI. 9.

Two aspects of rational nature are distinguishable: one being that nature itself, in so far as it is (so to speak) the basis of the conformity or nonconformity of human acts with itself; the other consisting in a certain power which this nature possesses, to discriminate between the actions in harmony with it and those discordant with it, a power to which we give the name of natural reason.—Suárez, *De legibus,* Book II, chap. v, § 9.

The sacred and golden cord of reason is called by us the common law of the State.—Plato, *Laws,* I, 645.

With respect to his moral integrity . . . man has need of three [forms of] law. For he needs eternal law, natural law and human law: eternal law being nothing more than the divine system of government [existing] in God, natural law being practical principles naturally known *per se,* and human law the conclusions drawn therefrom by the aid of reason.—Cajetan, *On St. Thomas Aquinas,* I.–II, qu. 91, art. 3.

In human affairs a thing is said to be just, from being right, according to the rule of reason.—St. Thomas Aquinas, I.–II, qu. 95, art. 2.

The rule and measure of human acts is the reason, which is the first principle of human acts.—*Ibid.,* qu. 90, art. 1.

Law . . . is nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated.—*Ibid.,* art. 4.

Since the rational soul is the proper form of man, there is in every man a natural inclination to act according to reason: and this is to act according to virtue.—*Ibid.,* qu. 94, art. 3.

Although reason is one in itself, yet it directs all things regarding man; so that whatever can be ruled by reason, is contained under the law of reason.—*Ibid.,* art. 2, ad 3.

Since there is nothing better than reason, and since it exists both in man and God, the first common possession of man and God is reason. But those who have reason in common must also have right reason in common. And since right reason is Law, we must believe that men have Law also in common with the gods. Further, those who share Law must also share Justice; and those who share these are to be regarded as members of the same commonwealth.—Cicero, *De legibus* I. vii. 23.

If the judgments of men were in agreement with Nature, so that, as the poet says, they considered "nothing alien to them which concerns mankind," then Justice would be equally observed by all. For those creatures who have received the gift of reason from Nature have also received right reason, and therefore they have also received the gift of Law, which is right reason applied to command and prohibition. And if they have received

Law, they have received Justice also. Now all men have received reason; therefore all men have received Justice.—Cicero, *De legibus* I. xii. 33.

The most foolish notion of all is the belief that everything is just which is found in the customs or laws of nations. Would that be true, even if these laws had been enacted by tyrants? . . . For Justice is one; it binds all human society, and is based on one Law, which is right reason applied to command and prohibition. Whoever knows not this Law, whether it has been recorded in writing anywhere or not, is without Justice.—*Ibid.*, xv. 42.

Every man is bound by the law of reason to do as he would be done to. —Christopher St. Germain, *Doctor and Student* (16th ed.), p. 118.

Although the rational nature is the foundation of the objective goodness of the moral actions of human beings, it may not for that reason be termed law; and by the same token, that nature may be spoken of as a standard, yet it is not correct to conclude on that ground that it is law, for "standard" is a term of wider application than is "law."—Suárez, *De legibus,* Book II, chap. v, § 6.

The basic principle of a rule and standard has wider connotations [than that of a law]. Moreover, the end is the rule and measure of the means, but it is not law; and the object is the rule and measure of actions, and similarly, it is not law.—*Ibid.*

Things which lack reason are not, strictly speaking, susceptible to law, just as they are not capable of obedience.—*Ibid.*, Book I, chap. i, § 2.

Properly speaking, only those who have the use of intellect and reason are governed by law, or are capable of being so governed.—*Ibid.*, chap. iv, § 2.

He who is subject to no law cannot sin; but a rational creature does possess the power to sin; and therefore, he is of necessity subject to law. —*Ibid.*, chap. iii, § 3.

Law . . . can [be considered to] exist only in view of some rational creature; for law is imposed only upon a nature that is free, and has for its subject-matter free acts alone.—*Ibid.*, § 2.

Law, then, is a thing that pertains to the mind.—*Ibid.*, chap. iv, § 2.

Law cannot be in absolute conformity with reason, unless it is just in every respect.—*Ibid.*, chap. ix, § 7.

In order that law may be in conformity with reason, it is not enough that the subject-matter of law should be righteous; on the contrary, its form must also be just and reasonable, which is to say that law must be established in a just manner; therefore, this [latter requirement] is [likewise] essential to the nature of law.—*Ibid.*, § 12.

Within the compass of . . . laws [of reason] we do not only comprehend whatsoever may be easily known to belong to the duty of all men, but even whatsoever may possibly be known to be of that quality, so that the same be by *necessary* consequence deduced out of clear and manifest principles. For if once we descend unto probable collections what is convenient for men, we are then in the territory where free and arbitrary determinations, the territory where human laws take place.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. viii. 2.

A tyrannical law, through not being according to reason, is not a law, absolutely speaking, but rather a perversion of law.—St. Thomas Aquinas, I.–II, qu. 92, art. 1, ad 4.

Where the law of man is in itself directly against the law of reason, or else the law of God, . . . then properly it cannot be called a law, but a corruption.—St. Germain, *Doctor and Student* (16th ed.), pp. 146–47.

Conscience[1] is an exercise of the reason, as is evident; and conscience bears witness to and reveals the work of the law written in the hearts of men, since it testifies that a man does ill or well, when he resists or obeys the natural dictates of right reason, revealing also, in consequence, the fact that such dictates have the force of law over man, even though they may not be externally clothed in the form of written law. Therefore, these dictates constitute natural law; and, accordingly, the man who is guided by them, is said to be a law unto himself, since he bears law written within himself through the medium of the dictates of natural reason.—Suárez, *De legibus,* Book II, chap. v, § 10.

Counsel, as such, is not of its very nature derived from a superior in so far as he possesses power over and charge of his subjects; whereas law should be an ordinance of the reason such that it emanates thus from one having charge of the community, even as this very definition provides.—*Ibid.*, Book I, chap. xii, § 4.

[1] See also "Conscience and Law," *infra,* p. 16.

Ius may refer to whatever is fair and in harmony with reason, this being, as it were, the general objective of virtue in the abstract.—Suárez, *De legibus*, Book I, chap. ii, § 4.

Reason has its power of moving from the will, . . . for it is due to the fact that one wills the end, that the reason issues its commands as regards things ordained to the end. But in order that the volition of what is commanded may have the nature of law, it needs to be in accord with some rule of reason. And in this sense is to be understood the saying that the will of the sovereign has the force of law; otherwise the sovereign's will would savour of lawlessness rather than of law.—St. Thomas Aquinas, I.–II, qu. 90, art. 1, ad 3.

All law proceeds from the reason and will of the lawgiver; the Divine and natural laws from the reasonable will of God; the human law from the will of man, regulated by reason.—*Ibid.*, qu. 97, art. 3.

Judgment by law is the judgment of reason alone; the judgment of a man is a judgment of reason and passion, that is, of the man and of the beast.—St. Robert Bellarmine, *De laicis* x (Murphy trans., p. 43).

Morality and Law

Morality (*genus moris*) begins only where the dominion of the will is found.—Suárez, *De legibus*, Book VII, chap. i, § 3.

An obligation is a certain moral impulse to action.—*Ibid.*, Book II, chap. vi, § 22.

We should distinguish three conditions which are required in the case of a moral action in order that it may be good. These were included by Aristotle under two heads. For the sake of clearness, however, we have made the [triple] distinction as indicated, a point which we shall explain more fully in the discussion that follows. The first condition is that the act shall be performed with sufficient knowledge; the second, that it shall be freely and deliberately performed; and the third, that it shall not only concern a righteous object, but shall also be attended by all the circumstances requisite to the righteousness of an act.—*Ibid.*, chap. x, § 3.

Dealings between man and man require to be suitably regulated. The principle of them is very simple—Thou shalt not, if thou canst help, touch that which is mine, or remove the least thing which belongs to me without my consent; and may I be of a sound mind, and do to others as I would that they should do to me.—Plato, *Laws*, XI, 913.

In nature, law is begotten not by opinion, but it is introduced by a certain innate force, as religion, piety, gratitude, defence, respect, truth.

Religion is that which produces the worship and ceremonial of a certain superior nature, which men call divine.

Piety is that by which benevolent duty and loving respect are paid to blood relations and to fatherland.

Gratitude is that in which is contained the memory of friendlinesses and the duty of repaying good offices.

Defence is that by which, in defending or punishing, force or injury, and generally, everything which would be harmful, is repelled.

Respect is that by which we deem men, distinguished by any dignity, worthy of a certain worship and honour.

Truth is the name by which those unchangeable things which are, or were, or will be, are called.—St. Augustine, *On Eighty-Three Different Questions,* XXXI. 1.

Distracted by this endless variety of customs, some who were half asleep (as I may say)—that is, who were neither sunk in the deep sleep of folly, nor were able to wake into the light of wisdom—have thought that there was no such thing as absolute right, but that every nation took its own custom for right; and that, since every nation has a different custom, and right must remain unchangeable, it becomes manifest that there is no such thing as right at all. Such men did not perceive, to take only one example, that the precept, "Whatsoever ye would that men should do unto you, do ye even so to them," cannot be altered by any diversity of national customs. And this precept, when it is referred to the love of God, destroys all vices; when to the love of one's neighbour, puts an end to all crimes.—St. Augustine, *On Christian Doctrine,* III, xiv.[2]

There are certain precepts of the law which have a perpetual necessity, having the force of law among all nations and which absolutely cannot be broken with impunity. Before the law, under the law, and still under the new covenant of grace, there is one law which is binding upon all men alike: "What thou wouldst not should be done unto thee, do thou not unto another"; and "what thou wouldst should be done unto thee, do that unto others."—John of Salisbury, *Policraticus* IV. vii.

If . . . it be . . . demanded, by what means it should come to pass (the greatest part of the law moral being so easy for all men to know) that so many thousands of men notwithstanding have been ignorant even of prin-

[2] For a quotation of this passage from St. Augustine by Hooker, see *infra,* under the rubric "Natural Law Defined."

cipal moral duties, not imagining the breach of them to be sin: I deny not but lewd and wicked custom, beginning perhaps at the first amongst few, afterwards spreading into greater multitudes, and so continuing from time to time, may be of force even in plain things to smother the light of natural understanding; because men will not bend their wits to examine whether things wherewith they have been accustomed be good or evil.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. viii. 11.

Indeed in all contracts and converse with men it is sufficient to pay heed to this one homely proverb: Make no man suffer what you would not bear yourself.[3]—St. Augustine, *On Order,* II. viii. 25.

The principle has been impressed upon everyone by nature that he should not do to another what he would not have another do to him, and a corollary of this, so far as punishment is concerned, obviously is that all should suffer and be willing to suffer what they themselves have done and wished to be done to others. Assuredly our laws assert that there is in a right of this kind equity of the highest type and justice so manifest that it arouses resentment in no one.—Gentili, *De legationibus,* Book II, chap. xxi.

Since human morals depend on their relation to reason, which is the proper principle of human acts, those morals are called good which accord with reason, and those are called bad which are discordant from reason. And as every judgment of speculative reason proceeds from the natural knowledge of first principles, so every judgment of practical reason proceeds from principles known naturally, as stated above (Qu. XCIV. AA. 2, 4): from which principles one may proceed in various ways to judge of various matters. For some matters connected with human actions are so evident, that after very little consideration one is able at once to approve or disapprove of them by means of these general first principles: while some matters cannot be the subject of judgment without much consideration of the various circumstances, which all are not competent to do carefully, but only those who are wise: just as it is not possible for all to consider the particular conclusions of sciences, but only for those who are versed in philosophy: and lastly there are some matters of which man cannot judge unless he be helped by Divine instruction; such as the articles of faith.

It is therefore evident that since the moral precepts are about matters which concern good morals; and since good morals are those which are in accord with reason; and since also every judgment of human reason must

[3] Literally, "They do to no one what they do not wish to suffer."

needs be derived in some way from natural reason; it follows, of necessity, that all the moral precepts belong to the law of nature; but not all in the same way. For there are certain things which the natural reason of every man, of its own accord and at once, judges to be done or not to be done: *e.g.*, "Honour thy father and thy mother," and "Thou shalt not kill, Thou shalt not steal"; and these belong to the law of nature absolutely.—And there are certain things which, after a more careful consideration, wise men deem obligatory. Such belong to the law of nature, yet so that they need to be inculcated, the wiser teaching the less wise: *e.g.*, "Rise up before the hoary head, and honour the person of the aged man," and the like.—And there are some things, to judge of which, human reason needs Divine instruction, whereby we are taught about the things of God: *e.g.*, "Thou shalt not make to thyself a graven thing, nor the likeness of anything; Thou shalt not take the name of the Lord thy God in vain."—St. Thomas Aquinas, I.–II, qu. 100, art. 1.

By the term "morals" in this passage is to be understood not only those conceptions which are deduced by pure natural reason as conclusions and principles, but also those matters which, having been added thereto by the light of faith, are in harmony with natural reason.—Cajetan, *On St. Thomas Aquinas,* I.–II, qu. 100, art. 1.

In every law, some precepts derive their binding force from the dictate of reason itself, because natural reason dictates that something ought to be done or to be avoided. These are called *moral* precepts: since human morals are based on reason.—At the same time there are other precepts which derive their binding force, not from the very dictate of reason (because, considered in themselves, they do not imply an obligation of something due or undue); but from some institution, Divine or human: and such are certain determinations of the moral precepts. When therefore the moral precepts are fixed by Divine institution in matters relating to man's subordination to God, they are called *ceremonial* precepts; but when they refer to man's relations to other men, they are called *judicial* precepts. Hence are two conditions attached to the judicial precepts: viz., first, that they refer to man's relations to other men; secondly, that they derive their binding force not from reason alone, but in virtue of their institution.—St. Thomas Aquinas, I.–II, qu. 104, art. 1.

The judicial precepts established by men retain their binding force for ever, so long as the state of government remains the same. But if the state or nation pass to another form of government, the laws must needs be

changed. For democracy, which is government by the people, demands different laws from those of oligarchy, which is government by the rich, as the Philosopher shows (*Polit.*, iv. 1). Consequently when the state of that people changed, the judicial precepts had to be changed also.—St. Thomas Aquinas, I.–II, qu. 104, art. 3, ad 2.

Law, properly understood, is the rule of moral actions, in so far as their rectitude is concerned.—Suárez, *De legibus,* Book II, chap. ii, § 5.

Law is a measure of rectitude.—*Ibid.*, Book I, chap. i, § 6.

Law is a rule and measure of acts, whereby man is induced to act or is restrained from acting.—St. Thomas Aquinas, I.–II, qu. 90, art. 1.

The name "law" is properly applied, in an absolute sense, to that which pertains to moral conduct. And accordingly, we should narrow the description given by St. Thomas,[3a] so that it runs as follows: law is a certain measure of moral acts, in the sense that such acts are characterized by moral rectitude through their conformity to law, and by perversity, if they are out of harmony with law.—Suárez, *De legibus,* Book I, chap. i, § 5.

Strictly and absolutely speaking, only that which is a measure of rectitude, viewed absolutely, and consequently only that which is a right and virtuous rule, can be called law.—*Ibid.*, § 6.

Law is the measure, not of all acts whatsoever, but of moral acts, with respect to their absolute goodness and rectitude, by reason of which rectitude, law impels one to perform these actions.—*Ibid.*, § 7.

All the goodness of virtue is measured by some standard which is of the nature of law.—*Ibid.*, Book II, chap. v, § 3.

That which is right is, I suppose, better even than law.—Menander, *Fragments: The Carthaginian.*

Law is not the same as right, but [is] an expression of right.—St. Thomas Aquinas, II.–II, qu. 57, art. 1, ad 2.

Law, which was founded by the natural sway of *Right—Right* which is sprung from man's natural affection, Right which is God's unerring *mind.* —Ausonius, *The Technopaegnion,* XII. iii. 12.

[3a] See the immediately preceding excerpt.

Nothing that lacks justice can be morally right.—Cicero, *De officiis* I. xix. 62.

The following are the precepts of the Law: to live honestly, not to injure another, and to give to each one that which belongs to him.—*Institutes* I. i. 3.

Nature's laws . . . forbid us to increase our means, wealth, and resources by despoiling others.

But this principle is established not by nature's laws alone (that is, by the common rules of equity), but also by the statutes of particular communities, in accordance with which in individual states the public interests are maintained. In all these it is with one accord ordained that no man shall be allowed for the sake of his own advantage to injure his neighbour. For it is to this that the laws have regard; this is their intent, that the bonds of union between citizens should not be impaired.—Cicero, *De officiis* III. v. 22–23.

Whence comes the law of nations, or even that law of ours which is called "civil"? Whence justice, honour, fair-dealing? . . . I say, from those men who, when these things had been inculcated by a system of training, either confirmed them by custom or else enforced them by statutes.—Cicero, *De re publica* I. ii. 2.

In both human and divine law, then, there are the same rule and the same means of measuring the relative gravity of sins; so that this entire question must be decided according to the particular case involved; just as in natural and divine law that sin is held to be *mortal* which is opposed to reason and to law.—Francisco de Vitoria, *De potestate civili,* no. 19.

Whatever is prohibited by the nature of things cannot be confirmed by any law.—*Digest* L. xvii. 188, § 1.

There are three kinds of human acts: . . . some acts are good generically, viz., acts of virtue; and in respect of these the act of the law is a precept or command, for "the law commands all acts of virtue" (*Ethic.* v. 1). Some acts are evil generically, viz., acts of vice, and in respect of these the law forbids. Some acts are generically indifferent, and in respect of these the law permits; and all acts that are either not distinctly good or not distinctly bad may be called indifferent.—St. Thomas Aquinas, I.–II, qu. 92, art. 2.

Generally speaking, from a legal standpoint, what is not proved to be evil, nor condemned as such, is not presumed to be bad, but rather is pre-

sumed to be good, even if some other course is at the time preferred because it can produce more useful effects, or is judged to be here and now more expedient.—Suárez, *De legibus,* Book VII, chap. vii, § 3.

No one can improve his condition by means of a crime.—*Digest* L. xvii. 134, § 1.

Everything which is permissible is not always honorable.—*Ibid.,* 144.

Conscience and Law

What man is there who can claim that in the eyes of every law he is innocent? But assuming that this may be, how limited is the innocence whose standard of virtue is the law! How much more comprehensive is the principle of duty than that of law! How many are the demands laid upon us by the sense of duty, humanity, generosity, justice, integrity—all of which lie outside the statute books!—Seneca, *De ira* II. xxviii. 2.

As a light is set in a lantern, that all that is in the house may be seen thereby; so Almighty God hath set conscience in the midst of every reasonable soul, as a light whereby he may discern and know what he ought to do, and what he ought not to do. Therefore, forasmuch as it behoveth thee to be occupied in such things as pertain to the law; it is necessary that thou ever hold a pure and clean conscience, specially in such things as concern restitution: for the sin is not forgiven, but if the thing that is wrongfully taken be restored. And I counsel thee also that thou love that is good, and fly that is evil; and that thou do to another as thou wouldest should be done to thee, and that thou do nothing to other, that thou wouldest not should be done to thee, that thou do nothing against truth, that thou live peaceably with thy neighbour, and that thou do justice to every man as much as in thee is: and also that in every general rule of the law thou do observe and keep equity. And if thou do thus, I trust the light of the lantern, that is, thy conscience, shall never be extincted.—St. Germain, *Doctor and Student* (16th ed.), p. 44.

The King of the universe . . . appoints to intervene in human affairs two judges whom the luckiest of sinners does not escape, namely, Conscience, or the innate estimation of oneself, and Public Opinion, or the estimation of others. These two tribunals are open to those who are debarred from all others; to these the powerless appeal; in them are defeated those who are wont to win by might, those who put no bounds to their presumption, those who consider cheap anything bought at the price of human blood,

those who defend injustice by injustice, men whose wickedness is so manifest that they must needs be condemned by the unanimous judgment of the good, and cannot be cleared before the bar of their own souls.—Hugo Grotius, *Mare liberum,* Preface.

Just as in the contentious forum the judge is bound to judge in accordance with what is alleged and proved, so in the forum of conscience a man is bound to base his judgment, not on his own sentiments, but on demonstrable reason or on the authority of the wise.—Vitoria, *De Indis,* Sec. I, Introduction.

The civil law is no less binding in conscience than the Divine law, even though the former is less fixed and stable than the latter. . . . The Divine law differs from the human law as to stability, since the Divine cannot be set aside by man, and the human can; but as to obligation they do not differ, for each obliges in conscience, under pain of either mortal or venial sin, according to the gravity of the case.—Bellarmine, *De laicis* xi (Murphy trans., pp. 45–46).

Laws framed by man are either just or unjust. If they be just, they have the power of binding in conscience, from the eternal law whence they are derived.—St. Thomas Aquinas, I.–II, qu. 96, art. 4.

Concerning human written law there is no doubt but that to act contrary to it is a sin, because those laws, as we have said many times, are binding in the court of conscience.—Vitoria, *De jure gentium et naturali.*[4]

The laws and constitutions of princes are binding in such a way as to render transgressors guilty in the court of conscience.—Vitoria, *De potestate civili,* no. 15.

Civil laws are binding in the court of conscience.—*Ibid.*

It is holden commonly by all doctors, that the commandments and rules of the law of man, or of a positive law that is lawfully made, bind all that be subjects to the law according to the mind of the maker, and that in the court of conscience.—St. Germain, *Doctor and Student* (16th ed.), p. 72.

Rectitude of conscience rests upon the observance of law, just as perversion of conscience rests upon its violation; for any law whatsoever is a rule which leads to eternal salvation if it is obeyed as it should be, and to the loss of that salvation if it is violated.—Suárez, *De legibus,* Preface.

[4] Trans. in J. B. Scott, *The Spanish Origin of International Law,* Part I, Appendix E, p. cxii.

The natural law and conscience . . . strictly speaking . . . are different. For the term "law" signifies a rule in general terms regarding those things which should be done; whereas "conscience" signifies a practical dictate in a particular case, wherefore it is the application of the law to a particular act (so to speak) rather than [the law itself].—Suárez, *De legibus,* Book II, chap. v, § 15.

Law is properly concerned with acts which are to be performed; while conscience deals also with things which have already been done, and consequently is endowed not only with the attribute of imposing obligations, but also with those of accusing, bearing witness, and defending.—*Ibid.*

From these facts, it also follows that "conscience" is a broader term than "natural law," since it puts into application, not only the law of nature, but also every other law, whether divine or human.—*Ibid.*

A natural obligation . . . cannot be separated from an obligation in conscience.—*Ibid.,* chap. ix, § 6.

It is the duty of a wise juror to reflect that the Roman people allows him only such functions as are consistent with his commission and his mandate; to remember that not only has power been entrusted to him, but faith reposed in him; to bring himself to acquit a man though he hate him, or to condemn a man though he hate him not; to study, not his own inclinations but his duty to his conscience and the law; and to observe the statute under which the accused is indicted, the character of the accused whose case he is examining, and the facts which are at issue before the court. These points must he keep before him; but further, it is equally the duty of a wise and high-minded man, on taking up the juror's tablet to record his vote, to bethink him that he is not alone, not free to obey his whim; and rather to take as his assessors the law and his conscience, justice and honour; to put away from him caprice, malice, prejudice, fear, and every passion, and to put first the testimony of his own conscience. Conscience is God's gift to us all and cannot be wrested from us, and if conscience testifies throughout our lives to good intentions and good deeds, those lives will be wholly fearless and entirely virtuous.—Cicero, *Pro Cluentio* lviii. 159.

Justice

The possession of justice in the soul is preferable to the possession of wealth.—Plato, *Laws,* XI, 913.

In justice all the other virtues have their root, since justice will not be maintained if we either put a value on things indifferent, or are easily

duped and prone to slip and prone to change.—Marcus Aurelius, *Thoughts,* XI. 10.

Justice is often thought to be the chief of the virtues, and more sublime "or than the evening or the morning star"; and we have the proverb—

In Justice is all Virtue found in sum.

—Aristotle, *Nicomachean Ethics,* V. i. 15.

If we speak of legal justice, it is evident that it stands foremost among all the moral virtues, for as much as the common good transcends the individual good of one person. In this sense the Philosopher declares (*Ethic.* v. 1) "that the most excellent of the virtues would seem to be justice," and more glorious than either the evening or the morning star.—St. Thomas Aquinas, II.–II, qu. 58, art. 12.

The duties prescribed by justice must be given precedence over the pursuit of knowledge and the duties imposed by it; for the former concern the welfare of our fellow-men; and nothing ought to be more sacred in men's eyes than that.—Cicero, *De officiis* I. xliii. 155.

If that virtue [Justice] which centres in the safeguarding of human interests, that is, in the maintenance of human society, were not to accompany the pursuit of knowledge, that knowledge would seem isloated and barren of results. In the same way, courage [Fortitude], if unrestrained by the uniting bonds of society, would be but a sort of brutality and savagery. Hence it follows that the claims of human society and the bonds that unite men together take precedence of the pursuit of speculative knowledge.—*Ibid.,* xliv. 157.

The meaning and theory of duty . . . is the beginning and end of justice. —Polybius, *The Histories,* VI, chap. 6, 7.

The world is disposed for the best when Justice reigns therein.—Dante, *De monarchia* I. xi. 1.

Where there is not sound faith, there cannot be justice, because the just man lives by faith . . . likewise, where there is no charity, there can be no justice. For the love of a neighbour does not work evil.—Gratian, *Decretum,* Part II, causa xxiv, qu. 1, can. xix, citing Augustine, *On the Sermon of Our Lord on the Mount,* Book I, chap. v, no. 13.

The more distinctive any quality is the more lovely it is; so that, although every virtue is lovely in a man, that is loveliest in him which is most distinctively human, and such is justice, which exists only in the rational or

intellectual part of a man, that is, in his will. This is so lovely that, as the Philosopher says in the fifth book of the *Ethics,* her enemies such as thieves and robbers love her, and therefore we see that her opposite, namely, injustice, is most of all hateful, as, for example, treachery, ingratitude, falsehood, theft, rapine and deceit and the like.—Dante, *Convivio,* Tractate I, xii.

Righteousness is goodness of the spirit shown in distributing what is according to desert.—Aristotle, *On Virtues and Vices,* ii. 6.

Unrighteousness is badness of spirit that makes men covetous of what is contrary to their desert.—*Ibid.*

To righteousness it belongs to be ready to distribute according to desert, and to preserve ancestral customs and institutions and the established laws, and to tell the truth when interest is at stake, and to keep agreements.—*Ibid.,* v. 2.

And it belongs to unrighteousness to transgress ancestral customs and regulations, to disobey the laws and the rulers, to lie, to perjure, to transgress covenants and pledges.—*Ibid.,* vii. 5.

To every act and to every word one of two epithets is applicable: it is either just or unjust. To no act and to no word can both these epithets be applied at the same time, for how can the same act at the same time be both just and not just? Every act is brought to the test as having the one or the other of these qualities; if it be found to have the quality of injustice, it is adjudged to be wicked, if of justice, to be good and honest.—Demosthenes, *Against Aristocrates,* 75.

There are . . . two kinds of injustice—the one, on the part of those who inflict wrong, the other on the part of those who, when they can, do not shield from wrong those upon whom it is being inflicted.—Cicero, *De officiis* I. vii. 23.

The principal element of justice is not to do harm, and to prevent, out of a duty of humanity, those who seek to do harm. When you do harm, you fall into injustice. And when you put no obstacle in the way of those who seek to do harm, you then serve and aid injustice.—John of Salisbury, *Policraticus* IV. xii.

Justice cannot have fellowship with the wicked.—Isidore, *Etymologies,* Book XVIII, chap. xv, § 9.

Justice is the bond of commonwealths.—Aristotle, *Magna moralia* I. xxxiii. 11.

Where . . . there is no true justice, there can be no right. For that which is done by right is justly done, and what is unjustly done cannot be done by right. For the unjust inventions of men are neither to be considered, nor spoken of as rights; for even they themselves say that right is that which flows from the fountain of justice, and deny the definition which is commonly given by those who misconceive the matter, that right is that which is useful to the stronger party. Thus, where there is not true justice there can be no assemblage of men associated by a common acknowledgment of right, and therefore there can be no people, as defined by Scipio or Cicero, and if no people, then no weal of the people, but only of some promiscuous multitude unworthy of the name of people. Consequently, if the republic is the weal of the people, and there is no people if it be not associated by a common acknowledgment of right, and if there is no right where there is no justice, then most certainly it follows that there is no republic where there is no justice. Justice is that virtue which gives everyone his due.—St. Augustine, *De civitate Dei* XIX. xxi.

Justice has its own special proper object over and above the other virtues, and this object is called the just, which is the same as *right*. Hence it is evident that right is the object of justice.—St. Thomas Aquinas, II.–II, qu. 57, art. 1.

Justice is a virtue which assigns to each man his due in conformity with the law; injustice claims what belongs to others, in opposition to the law.—Aristotle, *Rhetoric,* I. ix. 7.

It must be believed that there is one special virtue which is perfect above all others, the one that apportions to all men their just rights, that is to say, the virtue well named justice. For, in truth, any other virtue, if unattended by the good attributes of justice, will itself be unworthy of the name.—*Constitutions of Justinian, Fifth Collection,* XXIV, Preface.

Justice is the constant and perpetual desire to give to each one that to which he is entiled.—*Institutes* I. i.[5]

Justice . . . is to render to every man his due, whereby there is in man himself a certain just order of nature.—St. Augustine, *De civitate Dei,* XIX. iv.

[5] The same definition appears in *Digest* I. i. 10.

Justice is a habit of the mind observed for the common good of rendering to every man his due. It has its origin in nature; later, by reason of utility, certain things became customary; afterwards, fear of the laws and religion provided a sanction for the things derived from nature and approved by custom.—St. Augustine, *On Eighty-Three Different Questions,* XXXI. 1.

Justice is that by which, through right judgment, those things which are his own are distributed to every person.—Isidore, *Etymologies,* Book II, chap. xxiv, § 6.

The proper act of justice is nothing else than to render to each one his due.—St. Thomas Aquinas, II.–II, qu. 58, art. 11.

Justice is a habit whereby a man renders to each one his due by a constant and perpetual will.—*Ibid.,* art. 1.

It is not justice not to give every man his own. Justice is the virtue which gives every man his own; to a superior, an equal, an inferior, to each his due.—Gentili, *De jure belli,* Book II, chap. ii.

Justice and injustice have been defined in reference to laws and persons in two ways. Now there are two kinds of laws, particular and general. By particular laws I mean those established by each people in reference to themselves, which again are divided into written and unwritten; by general laws I mean those based upon nature. In fact, there is a general idea of just and unjust in accordance with nature, as all men in a manner divine, even if there is neither communication nor agreement between them. This is what Antigone in Sophocles evidently means, when she declares that it is just, though forbidden, to bury Polynices, as being [an act] naturally just:

> For neither to-day nor yesterday, but from all eternity,
> these statutes live and no man knoweth whence they came.—

Aristotle, *The "Art" of Rhetoric,* I. xiii. 1–2.

"The just" . . . means that which is lawful and that which is equal or fair, and "the unjust" means that which is illegal and that which is unequal or unfair.—Aristotle, *Nicomachean Ethics,* V. i. 8.

Now we observe that everybody means by Justice that moral disposition which renders men apt to do just things, and which causes them to act justly and to wish what is just; and similarly by Injustice that disposition which makes men act unjustly and wish what is unjust. Let us then assume this definition to start with, as broadly correct.—*Ibid.,* 3.

Injury is injustice. Hence there is this in the Comic Poet (Plautus, *Miles Gloriosus,* line 436), "Thou art Wrong" (*Inuria's*), who ventures anything contrary to the order of right.—Isidore, *Etymologies,* Book V, chap. xxvi, § 10.

The arguments of the unjust are summed up in the saying: "Let our might be our law of right."—Gentili, *De jure belli,* Book I, chap. xvii.

Justice properly so called regards the duty of one man to another: but all the other virtues regard the duty of the lower powers to reason.—St. Thomas Aquinas, I.–II, qu. 100, art. 2, ad 2.

The proper matter of justice consists of those things that belong to our intercourse with other men. . . . Hence the act of justice in relation to its proper matter and object is indicated in the words, "Rendering to each one his right," since, as Isidore says (*Etym.* x), "A man is said to be just because he respects the rights (*ius*) of others."—*Ibid.,* II.–II, qu. 58, art. 1.

It is the function of justice not to do wrong to one's fellow-men.—Cicero, *De officiis* I. xxviii. 99.

We may well be guided by those fundamental principles of justice . . .: first, that no harm be done to anyone; second, that the common interests be conserved.—Cicero, *ibid.,* x. 31.

The first office of justice is to keep one man from doing harm to another, unless provoked by wrong; and the next is to lead men to use common possessions for the common interests, private property for their own.—*Ibid.,* vii. 20.

Every act of ours ought to conform to the principles of justice, which are, first, to injure nobody and, second, to serve the common weal.—Balthazar Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. vi, § 6.

Justice is concerned about external things, not by making them, which pertains to art, but by using them in our dealings with other men.—St. Thomas Aquinas, II.–II, qu. 58, art. 3, ad 3.

All lawful things are just in one sense of the word, for what is lawful is decided by legislature, and the several decisions of the legislature we call rules of justice. Now all the various pronouncements of the law aim either at the common interest of all, or at the interest of a ruling class determined

either by excellence or in some other similar way; so that in one of its senses the term "just" is applied to anything that produces and preserves the happiness, or the component parts of the happiness, of the political community.—Aristotle, *Nicomachean Ethics,* V. i. 12–13.

Justice, as well as law and right reason, exists by nature and not by convention.—Diogenes Laertius, *Lives of Eminent Philosophers*: "Zeno," VII. 128.

Now some kinds of Justice are natural, others conventional. And we must not think of them as wholly exempt from alteration. Even nature's rules are sometimes liable to change. For instance if we all constantly practised throwing with our left hands, we should become ambidextrous; yet the left hand is such by nature, and the right is none the less superior to the left, however much we equalize the use of the two. Change of use does not abolish the natural distinction. If in general and at most times left retains the familiar character of left, and right of right, the distinction is a natural one.

And so with the rules of natural Justice. If through our practice they are changed, is there on that account no such thing as natural Justice? Surely there is such a thing. For that which in general prevails is obviously natural Justice; whilst the law we ourselves lay down and observe takes thereby the character of Justice, and is termed by us conventional Justice. Natural Justice, then, is superior to the other kind; but what we are seeking is social Justice; and this is the conventional and not the natural type.—Aristotle, *Magna moralia* I. xxxiii. 19–21.

The human will can, by common agreement, make a thing to be just provided it be not, of itself, contrary to natural justice, and it is in such matters that positive right has its place. . . . If, however, a thing is, of itself, contrary to natural right, the human will cannot make it just. . . . Hence it is written (Isa. x. 1): "Woe to them that make wicked laws."—St. Thomas Aquinas, II.–II, qu. 57, art. 2, ad 2.

He who submits to reason submits to justice.—Gentili, *De jure belli,* Book II, chap. xvii.

For the just is twofold; first, what is naturally just, this being equivalent to what is right according to natural reason, [a phase of the just] that is never defective, provided that the reason itself does not err; secondly, what is legally just, that is to say, what is constituted by human law, [a phase]

that is often defective in specific cases, though just in a general sense.—Suárez, *De legibus,* Book I, chap. ii, § 9.

A rule of justice is natural that has the same validity everywhere, and does not depend on our accepting it or not. A rule is conventional that in the first instance may be settled in one way or the other indifferently, though having once been settled it is not indifferent.—Aristotle, *Nicomachean Ethics,* V. vii. 1.

The rules of justice ordained not by nature but by man are not the same in all places, since forms of government are not the same, though in all places there is only one form of government that is natural, namely, the best form.—*Ibid.,* 5.

Concord in a State, the strongest and best bond of permanent union in any commonwealth, . . . can never be brought about without the aid of justice.—Cicero, *De re publica* II. xlii. 69.

Justice . . . directs man in his relations with other men. Now this may happen in two ways: first as regards his relations with individuals, secondly, as regards his relations with others in general, in so far as a man who serves a community, serves all those who are included in that community. Accordingly justice in its proper acceptation can be directed to another in both these senses. Now it is evident that all who are included in a community, stand in relation to that community as parts to a whole; while a part, as such, belongs to a whole, so that whatever is the good of a part can be directed to the good of the whole. It follows therefore that the good of any virtue, whether such virtue direct man in relation to himself, or in relation to certain other individual persons, is referable to the common good, to which justice directs: so that all acts of virtue can pertain to justice, in so far as it directs man to the common good. It is in this sense that justice is called a general virtue. And since it belongs to the law to direct to the common good, as stated above (I.–II. Q. xc., A. 2), it follows that the justice which is in this way styled general, is called *legal justice,* because thereby man is in harmony with the law which directs the acts of all the virtues to the common good.—St. Thomas Aquinas, II.–II, qu. 58, art. 5.

In so far as people comprehend the common good and the good of the community, they are endowed with justice and legal rectitude.—Egidio Colonna, *Li livres du gouvernement des rois,* Book I, part II, chap. x.

Without justice and legal rectitude kingdoms cannot endure.—*Ibid.*

It is impossible . . . to exercise justice except in society, since it is the virtue determining equity among many.—Bellarmine, *De laicis* v (Murphy trans., p. 21).

But if Justice is conformity to written laws and national customs, and if, as the same persons claim, everything is to be tested by the standard of utility, then anyone who thinks it will be profitable to him will, if he is able, disregard and violate the laws. It follows that Justice does not exist at all, if it does not exist in Nature, and if that form of it which is based on utility . . . can be overthrown by that very utility itself. And if Nature is not to be considered the foundation of Justice, that will mean the destruction [of the virtues on which human society depends]. For where then will there be a place for generosity, or love of country, or loyalty, or the inclination to be of service to others or to show gratitude for favours received? For these virtues originate in our natural inclination to love our fellow-men, and this is the foundation of Justice. . . . But if the principles of Justice were founded on the decrees of peoples, the edicts of princes, or the decisions of judges, then Justice would sanction robbery and adultery and forgery of wills, in case these acts were approved by the votes or decrees of the populace. But if so great a power belongs to the decisions and decrees of fools that the laws of Nature can be changed by their votes, then why do they not ordain that what is bad and baneful shall be considered good and salutary? Or, if a law can make Justice out of Injustice, can it not also make good out of bad? But in fact we can perceive the difference between good laws and bad by referring them to no other standard than Nature; indeed, it is not merely Justice and Injustice which are distinguished by Nature, but also and without exception things which are honourable and dishonourable.—Cicero, *De legibus* I. xv-xvi. 42–44.

Justice and all things honourable are to be sought for their own sake. And indeed all good men love fairness in itself and Justice in itself, . . . Therefore Justice must be sought and cultivated for her own sake; and if this is true of Justice, it is also true of equity; and if this is the case with equity, then all the other virtues are also to be cherished for their own sake. . . . equity . . . demands no reward or price; consequently it is sought for its own sake. And the same motive and purpose characterize all the virtues. —*Ibid.*, xviii. 48.

A human virtue is one "which renders a human act and man himself good" [*Ethic.* ii. 6]: and this can be applied to justice. For a man's act is

made good through attaining the rule of reason, which is the rule whereby human acts are regulated. Hence, since justice regulates human operations, it is evident that it renders man's operations good, and, as Tully declares (*De officiis* i. 7), good men are so called chiefly from their justice, wherefore, as he says again (*ibid*) "the lustre of virtue appears above all in justice."—St. Thomas Aquinas, II.–II, qu. 58, art. 3.

Justice [is a] friend to sobermode and goodnesse, queene of all other vertues, bicause she teacheth to do that, which a man ought to do, and to shon that a man ought to shonn, and therfore is she most perfect, bicause through her the woorkes of the other vertues are brought to passe, and she is a helpe to him that hath her both for him selfe and for others: without the which (as it is commanlye said) Jupiter him selfe coulde not well govern hys kingdome.—Baldassare Castiglione, *The Courtier* (Hoby trans. p. 310).

What is just does not need the addition of a price, since its performance is owed as an obligation, and it is unjust to charge a price for performing an existing obligation. To sell justice is therefore iniquity; to sell injustice is not only iniquity but insanity. For injustice is universally disapproved and there is general agreement that it ought nowhere to exist; justice on the other hand is everywhere an obligation or indebtedness in such a sense that no price may be charged for it without committing a crime.—John of Salisbury, *Policraticus* V. xi.

Though an advocate can sell his proper services and a jurist his good advice, it is never lawful to sell justice.—*Ibid.*, V. xv.

Since to live in peace is chief of man's blessings, as we have said before, and since this is more fully and easily accomplished by Justice, charity will make Justice thrive greatly; with her strength will the other grow strong. —Dante, *De monarchia* I. xi. 6.

We demand that men who are courageous and high-souled shall at the same time be good and straightforward, lovers of truth, and foes to deception; for these qualities are the centre and soul of justice.—Cicero, *De officiis* I. xix. 63.

Justice and Law

Let us investigate the origins of Justice. Well then, the most learned men have determined to begin with Law, and it would seem that they are right, if, according to their definition, Law is the highest reason, implanted in

Nature, which commands what ought to be done and forbids the opposite. This reason, when firmly fixed and fully developed in the human mind, is Law. And so they believe that Law is intelligence, whose natural function it is to command right conduct and forbid wrongdoing. They think that this quality has derived its name in Greek from the idea of granting to every man his own, and in our language I believe it has been named from the idea of choosing.[6] For as they have attributed the idea of fairness to the word law, so we have given it that of selection, though both ideas properly belong to Law. Now if this is correct, as I think it to be in general, then the origin of Justice is to be found in Law, for Law is a natural force; it is the mind and reason of the intelligent man, the standard by which Justice and Injustice are measured.—Cicero, *De legibus* I. vi. 18–19.

That does not seem to me to be a law which is not just.—St. Augustine, *On Free Will,* I. v. 11.

As Augustine says (*De lib. arb.* i. 5) "that which is not just seems to be no law at all": wherefore the force of a law depends on the extent of its justice.—St. Thomas Aquinas, I.–II, qu. 95, art. 2.

It is inherent in the nature and essence of law that it shall prescribe just things.—Suárez, *De legibus,* Book I, chap. ix, § 2.

In order to be just, law must be ordered for the common good.—*Ibid.,* chap. vi, § 3.

Laws are said to be just, both from the end, when, to wit, they are ordained to the common good,—and from their author, that is to say, when the law that is made does not exceed the power of the lawgiver,—and from their form, when, to wit, burdens are laid on the subjects, according to an equality of proportion and with a view to the common good. For, since one man is a part of the community, each man, in all that he is and has, belongs to the community; just as a part, in all that it is, belongs to the whole; wherefore nature inflicts a loss on the part, in order to save the whole: so that on this account, such laws as these, which impose proportionate burdens, are just and binding in conscience, and are legal laws.—St. Thomas Aquinas, I.–II, qu. 96, art. 4.

Law is an act of legal justice. For the prince, when he makes law, should have regard above all for the common good, which is a matter pertaining to legal justice.—Suárez, *De legibus,* Book I, chap. v, § 15.

[6] Νόμος is derived by Cicero from νέμω, "to distribute," *lex* from *lego,* "to choose."

Laws may be unjust in two ways: first, by being contrary to human good. . . . Secondly, . . . through being opposed to the Divine good.—St. Thomas Aquinas, I.–II, qu. 96, art. 4.

A law may be described as unjust, not only when it causes specific harm, but also when it is wholly useless and unjustified by reason.—Suárez, *De legibus,* Book VI, chap. ix, § 12.

A law not characterized by . . . justice or righteousness is not a law, nor does it possess any binding force; indeed, on the contrary, it cannot be obeyed.—*Ibid.,* Book I, chap. ix, § 11.

The evidence of injustice in the law must be such as to constitute a moral certainty. For if the matter is doubtful, a presumption must be made in favour of the lawgiver.—*Ibid.*

In the mere condition that law should be just, there are included the conditions that law should be [such that obedience] is possible and that it should be useful.—*Ibid.,* chap. vi, § 3.

It is inherent in the nature of law, that it be justly established; and if it is established in any other way, it will not be true law. . . .

For in order that a law may be made justly, three phases of justice must be perceptible in its form.

The first phase is legal justice. . . .

The second phase is commutative justice. . . .

The third phase of justice is distributive.

—*Ibid.,* chap. ix, §§ 12, 13.

If thou take all that the words of the law giveth thee, thou shall sometime do against the law.—St. Germain, *Doctor and Student* (16th ed.), p. 45.

I believe that justice should be preferred to the letter of the law, and honour to advantage.—Gentili, *De jure belli,* Book III, chap. xii.

Law Defined[7]

Law (*ius*) is either natural, or civil, or international (*gentium*).—Isidore, *Etymologies,* Book V, chap. iv.

All laws are either divine or human. Divine laws depend on nature, human laws on custom, and so the latter differ, since different laws please different peoples.—*Ibid.,* chap. ii.

[7] See also "Morality and Law."

If one is speaking . . . of law in the strict sense of the term, only that is law which imposes an obligation of some sort.—Suárez, *De legibus,* Book I, chap. i, § 7.

Those who apply themselves to the study of law should know, in the first place, from whence the science is derived. The law obtains its name from justice; for (as Celsus elegantly says), law is the art of knowing what is good and just.—*Digest* I. i. 1.

The term "law" is used in several ways. First, whatever is just and good is called law, as is the case with natural law. Second, where anything is useful to all or to the majority in any state, as for instance the Civil Law.—*Ibid.,* 11.

The orator Demosthenes thus defined it [law]: "A law is something which is proper for all men to obey for many reasons, and principally because every law was devised by, and is a gift of God; the decree of learned men; the restraint of those who either voluntarily or involuntarily are guilty of crime; it is also a common obligation of the State, by whose rules all those who reside therein should regulate their lives."—*Ibid.,* iii. 2.[8]

Chrysippus, a Stoic philosopher of the greatest erudition, began a book which he wrote on law: "Law is the queen of all things, Divine and human. It should also be the governor, the leader, the ruler, of both the good and the bad, and, in this way, be the standard of whatever is just and unjust, as well as of those things which are civil by Nature, prescribing what should be done, and prohibiting what should not be done."—*Ibid.*

Law . . . is a rule, emanating from a certain wisdom and intelligence, that has compulsory force.—Aristotle, *Nicomachean Ethics,* X. ix. 12.

Now, the law is particular or general. By particular, I mean the written law in accordance with which a state is administered; by general, the unwritten regulations which appear to be universally recognized.—Aristotle, *The "Art" of Rhetoric,* I. x. 3.

State opinion . . . is what you call law . . . we must regard law as something noble, and seek after it as a good. . . . True opinion is discovery of reality . . . so law tends to be discovery of reality.—Plato, *Minos,* pp. 314c, 315.

[8] In more extended form this quotation from Demosthenes (*Against Aristogeiton*) also appears under the rubric "General Application of Law," *infra,* p. 39.

Law (*lex*) is an ordinance of the people, which those who are greater by birth, together with the people (*plebibus*) sanction.—Isidore, *Etymologies,* Book II, chap. x, § 1.

The notion of law contains two things: first, that it is a rule of human acts; secondly, that it has coercive power.—St. Thomas Aquinas, I.–II, qu. 96, art. 5.

Laws . . . [are] imposed either by each man upon himself, or by a public society upon the particulars thereof, or by all nations of men upon every several society, or by the Lord himself upon any or every of these.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. xv. 1.

For law there are two requisites: impulse and direction, or (so to speak), goodness and truth; that is to say, right judgment concerning the things that should be done and an efficacious will impelling to the performance of those things; and therefore, law may consist of both an act of the will and an act of the intellect.—Suárez, *De legibus,* Book I, chap. v, § 20.

Law is a common, just and stable precept, which has been sufficiently promulgated.—*Ibid.,* chap. xii, § 5.

Whereas the law is passionless, passion must ever sway the heart of man. —Aristotle, *Politics,* III. xv. 5.

Nations, kingdoms, and cities have individual conditions which must be governed by different laws. For law is the directive principle of life.—Dante, *De monarchia* I. xiv. 2.

The law will be honourable, just, possible of fulfilment, in agreement with nature, in agreement with the usage of the country, appropriate to place and time, necessary and useful, also perfectly clear, lest through obscurity it contain anything which might be deceptive; [and] written for the common utility of the citizens, no private person having been favoured by it.—Isidore, *Etymologies,* Book II, chap. x, § 6.[9]

Law is the gift of God, the model of equity, a standard of justice, a likeness of the divine will, the guardian of well-being, a bond of union and solidarity between peoples, a rule defining duties, a barrier against the vices and the destroyer thereof, a punishment of violence and all wrongdoing.—John of Salisbury, *Policraticus* VIII. xvii.

[9] This often-quoted definition occurs also in Book V, chap. xxi of the *Etymologies,*

Not only is the civil law an agreement and a bond of union among citizens, but the same is true of the law of nations as regards nations, and the law of nature as regards mankind.—Gentili, *De jure belli,* Book I, chap. xxv.

Of Law there can be no less acknowledged, than that her seat is the bosom of God, her voice the harmony of the world; all things in heaven and earth do her homage, the very least as feeling her care, and the greatest as not exempted from her power; both Angels and men and creatures of what condition soever, though each in different sort and manner, yet all with uniform consent, admiring her as the mother of their peace and joy. —Hooker, *Of the Laws of Ecclesiastical Polity,* I. xvi. 8.

Just as that divine mind is the supreme Law, so, when [reason] is perfected in man, [that also is Law; and this perfected reason exists] in the mind of the wise man; but those rules which, in varying forms and for the need of the moment, have been formulated for the guidance of nations, bear the title of laws rather by favour than because they are really such. For every law which really deserves that name is truly praiseworthy as they prove by approximately the following arguments. It is agreed, of course, that laws were invented for the safety of citizens, the preservation of States, and the tranquillity and happiness of human life, and that those who first put statutes of this kind in force convinced their people that it was their intention to write down and put into effect such rules as, once accepted and adopted, would make possible for them an honourable and happy life; and when such rules were drawn up and put in force, it is clear that men called them "laws." From this point of view it can be readily understood that those who formulated wicked and unjust statutes for nations, thereby breaking their promises and agreements, put into effect anything but "laws." It may thus be clear that in the very definition of the term "law" there inheres the idea and principle of choosing what is just and true.—Cicero, *De legibus* II. v. 11.

What of the many deadly, the many pestilential statutes which nations put in force? These no more deserve to be called laws than the rules a band of robbers might pass in their assembly. For if ignorant and unskilful men have prescribed deadly poisons instead of healing drugs, these cannot possibly be called physicians' prescriptions; neither in a nation can a statute of any sort be called a law, even though the nation, in spite of its being a ruinous regulation, has accepted it. Therefore Law is the distinction between things just and unjust, made in agreement with that primal and most an-

cient of all things, Nature; and in conformity to Nature's standard are framed those human laws which inflict punishment upon the wicked but defend and protect the good.—*Ibid.*, 13.

All law consists either in the acquisition, preservation, or diminution of rights; for it has reference to the way in which anything becomes the property of a person, or how he can preserve it or his rights, or how he can alienate or lose them.—*Digest* I. iii. 41.

Law is an act of government and of dominion, or jurisdiction.—Suárez, *De legibus,* Book II, chap. i, § 1.

Law may be considered as it is in the lawmaker himself; in which sense, as we were saying above, law is conceived in the mind of God from eternity. Secondly, law may be considered as it exists in the subjects on whom the law is imposed; from which standpoint, it is customarily said that the law of nature has been instilled into the minds of men. Thirdly, it may be considered as it is in some different symbolic manifestation (*signum*), or some other external materialization (*materia exterior*); for example, in writing or even in a spoken word that declares the will of a superior.—*Ibid.*, Book I, chap. iv, § 4.

Three or four elements are necessary and sufficient for law: namely, fitness of subject-matter, power, and will sufficiently manifested externally.—*Ibid.*, Book VII, chap. xiv, § 3.

According to the . . . etymology, which derives *ius* from *iubendum* (ordering), the true meaning of *ius* would seem to be *lex*. For *lex* is based upon ordering (*iussio*), or command.—*Ibid.*, Book I, chap. ii, § 6.

There are two branches of this study, namely: public and private. Public Law is that which concerns the administration of the Roman government; Private Law relates to the interests of individuals. Thus Private Law is said to be threefold in its nature, for it is composed of precepts of Natural Law, of those of the Law of Nations, and of those of the Civil Law.—*Institutes* I. i. 4.

The law of *England* is grounded upon the *law of reason,* the *law of God,* the *general customs* of the realm, and upon certain *principles* that be called maxims, upon the *particular customs* used in diverse cities and countries, and upon *statutes* which have been made in diverse parliaments by our sovereign lord the king, and his progenitors, and by the lords spiritual and

temporal, and all the commons of the realm.—St. Germain, *Doctor and Student* (16th ed.), p. 97.

Commonly accepted opinions today have the same authority as the responses of wise men had in olden times, and from these it was not lawful for a judge to depart. They are regarded as law, and they come under the head of law.—Gentili, *Hispanicae advocationis,* Book II, chap. xi.

The Purpose and Function of Law

We shall find nothing venerable or admirable which is not associated with law, since the whole round world, the heavenly bodies and what we call the seasons are plainly, if we can trust our senses, controlled by law and order.—Demosthenes, *Against Aristogeiton,* II. 26–27.

All the noble and reverend qualities that adorn and preserve our city,—sobriety, orderliness, the respect of your younger men for parents and elders—hold their own, backed by the laws, against the base qualities of indecency, audacity, and shamelessness. For vice is vigorous, daring, and grasping; on the other hand, probity is peaceful, retiring, inactive, and terribly liable to come off second-best. Therefore those of you who sit upon juries ought to protect and strengthen the laws, for with the help of the laws the good overcome the bad. If not, all is dissolved, broken up, confounded, and the city becomes the prey of the most profligate and shameless.—*Ibid.,* I. 24–25.

You will find that the fruits of lawlessness are madness, intemperance and greed, but from the laws come wisdom, sobriety and justice.—*Ibid.,* II. 25.

Why need one repeat that order is everywhere maintained by the laws and by obedience to the laws?—*Ibid.,* I. 27.

Law is instituted for a certain being or certain beings.—Suárez, *De legibus,* Book I, chap. vi, § 1.

[The first] characteristic condition requisite for law . . . consists in the moving and bringing of the subject to the performance of an action.—*Ibid.,* § 15.

Laws were made, that the stronger might not in all things have his way.—Ovid, *Fasti,* III. 279.

Laws are partly framed for the sake of good men, in order to instruct them how they may live on friendly terms with one another, and partly

for the sake of those who refuse to be instructed, whose spirit cannot be subdued, or softened, or hindered from plunging into evil. . . . for them the legislator legislates of necessity, and in the hope that there may be no need of his laws.—Plato, *Laws,* IX. 880.

The office of the law is to command, to forbid, and to punish.—*Digest* I. iii. 7.

Every law either permits something . . . or forbids [something] . . . or punishes . . . For human life is regulated by its reward or punishment.—Isidore, *Etymologies,* Book V, chap. xix.

Laws are made that human temerity may be restrained by fear of them, and that the innocent may be safe among the wicked, and that the capacity of injuring in the wicked themselves may be held in check by dreaded punishment. For human life is regulated by the reward or punishment of the law.—*Ibid.,* Book II, chap. x, § 5.

For there are two objects, men of Athens, for which all laws are framed —to deter any man from doing what is wrong, and, by punishing the transgressor, to make the rest better men.—Demosthenes, *Against Aristogeiton,* I. 17.

It is the function of law to enlighten and instruct in accordance with the words [of Ps. cxviii, v. 105—Douay Version], "Thy word is a lamp to my feet."—Suárez, *De legibus,* Book I, chap. v, § 3.

A law . . . generally taken, is a directive rule unto goodness of operation. —Hooker, *Of the Laws of Ecclesiastical Polity,* I. viii. 4.

In order that man might have peace and virtue, it was necessary for laws to be framed: for, as the Philosopher says (*Polit.* i. 2), "as man is the most noble of animals if he be perfect in virtue, so is he the lowest of all, if he be severed from law and righteousness"; because man can use his reason to devise means of satisfying his lusts and evil passions, which other animals are unable to do.—St. Thomas Aquinas, I.–II, qu. 95, art. 1.

To live by one man's will became the cause of all men's misery. This constrained them to come unto laws, wherein all men might see their duties beforehand, and know the penalties of transgressing them.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. x. 5.

As the Philosopher says (*Rhet.* i. 1), "it is better that all things be regulated by law, than left to be decided by judges": and this for three reasons. First, because it is easier to find a few wise men competent to frame right laws, than to find the many who would be necessary to judge aright of each single case.—Secondly, because those who make laws consider long beforehand what laws to make; whereas judgment on each single case has to be pronounced as soon as it arises: and it is easier for man to see what is right, by taking many instances into consideration, than by considering one solitary fact.—Thirdly, because lawgivers judge in the abstract and of future events; whereas those who sit in judgment judge of things present, towards which they are affected by love, hatred, or some kind of cupidity; wherefore their judgment is perverted.

Since then the animated justice of the judge is not found in every man, and since it can be deflected, therefore it was necessary, whenever possible, for the law to determine how to judge, and for very few matters to be left to the decision of men.—St. Thomas Aquinas, I.–II, qu. 95, art. 1, ad 2.

Every law is ordained to the common good.—*Ibid.*, qu. 90, art. 2.

No law is entirely convenient for everyone; this alone is asked, whether it is good for the majority and on the whole. If every law which harms anyone in his private affairs is to be repealed and discarded, what good will it do for all the citizens to pass laws which those at whom they are aimed will at once annul?—Speech of Marcus Porcius Cato, reported by Livy, XXXIV. iii. 5.

Laws ought "not to be enacted for the private good of any individual, but in the common interest of all the citizens," as is ruled in can. 2, Dist. 4, a citation from Isidore.—Vitoria, *De iure belli*, no. 12.

Since the common good is preferred to private good whenever the two cannot exist simultaneously, therefore, laws are made in absolute form, for the sake of the common good, and take no account of individual cases.—Suárez, *De legibus*, Book I, chap. vii, § 14.

Law . . . is necessary which commands and prohibits to all in general what is for the common welfare.—Bellarmine, *De laicis* xi (Murphy trans., p. 48).

For certain laws deal directly with subject-matter that is common; others, with the good of individuals; but the reason why law deals with either kind

of subject-matter is the common good, which therefore should always be the primary aim.—Suárez, *De legibus,* Book I, chap. vii, § 8.

It is inherent in the nature and essence of law, that it shall be enacted for the sake of the common good.—*Ibid.,* § 1.

The law must needs regard principally the relationship to happiness.—St. Thomas Aquinas, I.–II, qu. 90, art. 2.

Law, in so far as it is externally imposed upon the subjects, is a species of means for securing their welfare and peace or happiness.—Suárez, *De legibus,* Book I, chap. iv, § 6.

The subject-matter of law should be advantageous for and adapted to the common good, not through the intention of the lawmaker, but of itself.—*Ibid.,* chap. vii, § 9.

The subject-matter with which law is concerned, may sometimes be the common good for its own sake and primarily; while at other times it is a private good for its own sake and primarily, but a private good which redounds to the common welfare.—*Ibid.,* § 8.

For the validity and essence of a law, it is necessary only that its subject-matter be advantageous to and suitable for the common good, at the time and place involved, and with respect to the people and community in question.—*Ibid.,* § 9.

Law is (so to speak) an instrument by means of which the prince exercises a moral influence upon the state, in order that he may govern it; and therefore, law should serve the common good of that same state.—*Ibid.,* § 5.

Even as an act not of itself evil becomes evil through the just prohibition of a superior, so an act not of itself either good or evil, will become good through a law which justly prescribes it; and accordingly, law always relates to a good act, since it either presupposes that the act is good, or causes it to be so.—*Ibid.,* chap. ix, § 5.

That which doth assign unto each thing the kind, that which doth moderate the force and power, that which doth appoint the form and measure of working, the same we term a Law. So that no certain end could ever be attained, unless the actions whereby it is attained were regular; that is to say, made suitable, fit and correspondent unto their end, by

some canon, rule or law . . . All things therefore do work after a sort according to law.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. ii. 1–2.

Civic courage is due to law.—Aristotle, *Eudemian Ethics,* III. i. 19.

Laws . . . ensure for every citizen the opportunity of obtaining redress if he is wronged.—Demosthenes, *Against Meidias,* 30.

The Laws bear the same relation to business transactions as medicines do to diseases. Hence it sometimes happens that the effect is not what was anticipated, and that what was considered to be beneficial proves, through experience, to be worthless.—*Constitutions of Justinian, Eighth Collection,* XII, Preface.

A law may sometimes be established for the community itself, viewed as such; that is to say, it may be established by forbidding or prescribing an act which can be performed only by the community acting as a community. —Suárez, *De legibus,* Book I, chap. vi, § 17.

If any of you cares to inquire what is the motive-power that calls together the Council, draws the people into the assembly, fills the law-courts, makes the old officials resign readily to the new, and enables the whole life of the State to be carried on and preserved, he will find that it is the laws and the obedience that all men yield to the laws; since, if once they were done away with and every man were given licence to do as he liked, not only does the constitution vanish, but our life would not differ from that of the beasts of the field.—Demosthenes, *Against Aristogeiton,* I. 20.

No institution in our state deserves to be so carefully preserved as the law. Abolish law and there can be no means whereby the individual can ascertain what belongs to him and what to other people: there can be no universal and invariable standard.—Cicero, *Pro Aulius Caecina* xxv. 70.

Promulgation of Law

Let us distinguish in law two phases. One is that which exists in the inner disposition of the lawmaker, in so far as the law in question has already been defined in his mind, and established by his absolute decree and fixed will. The other is that phase in which a law is externally established and promulgated for the subjects.—Suárez, *De legibus,* Book II, chap. i, § 5.

Promulgation is essential to law.—*Ibid.,* § 1.

In order that a law obtain the binding force which is proper to a law, it must needs be applied to the men who have to be ruled by it. Such

application is made by its being notified to them by promulgation. Wherefore promulgation is necessary for the law to obtain its force.—St. Thomas Aquinas, I.–II, qu. 90, art. 4.

Those who are not present when a law is promulgated, are bound to observe the law, in so far as it is notified, or can be notified to them by others, after it has been promulgated.—*Ibid.*, ad 2.

The promulgation that takes place now, extends to future time by reason of the durability of written characters, by which means it is continually promulgated. Hence Isidore says (*Etym.* v. 3; ii. 10) that "lex (law) is derived from legere" (to read) because it is written.—*Ibid.*, ad 3.

General Application of Law

Force belongs to the few, but the laws to all alike.—Demosthenes, *Against Meidias*, 45.

Others argued that no single citizen should attain such eminence that he could not be questioned under the laws; that nothing was so essential to equally distributed liberty as that every man, however powerful, should plead his cause. What now—not to mention supreme position in the state—could be safely entrusted to any man if no accounting could be asked? Against a man, they said, who cannot brook equitable law, no violence is illegal.—Livy, XXXVIII. L. 8–9.

The whole life of men, . . . whether they dwell in a large state or a small one, is governed by nature and by the laws. Of these, nature is something irregular and incalculable, and peculiar to each individual; but the laws are something universal, definite, and the same for all. Now nature, if it be evil, often chooses wrong, and that is why you will find men of an evil nature committing errors. But the laws desire what is just and honourable and salutary; they seek for it, and when they find it, they set it forth as a general commandment, equal and identical for all. The law is that which all men ought to obey for many reasons, but above all because every law is an invention and gift of the gods, a tenet of wise men, a corrective of errors voluntary and involuntary, and a general covenant of the whole State, in accordance with which all men in that State ought to regulate their lives.—Demosthenes, *Against Aristogeiton*, I. 15–16.

Law, then, is a kind of rule establishing or pointing out, in regard to its own subject-matter or the operation with which it is concerned, that mean

which is to be preserved for the sake of right and fitting action; and this rule is in itself universal, having relation to all persons, in due proportion; therefore, law is in itself general.—Suárez, *De legibus,* Book I, chap. vi, § 12.

Law is called general, not because it is necessarily imposed upon the community as a community and as a mystical body; but because it should be propounded in general terms, such that it may apply to each and every person, in accordance with the exigencies of the subject-matter, in which sense it is true that law is instituted as a rule for persons who are real, not simply fictitious.—*Ibid.,* § 17.

Precept and law are not interchangeable; since, though every law is a precept, not every precept is a law. On the contrary, [a law] must satisfy certain special conditions, among which is the requirement that it shall be a common precept.—*Ibid.,* § 16.

It is inherent in the nature of law, as signified by this name, that it be a common precept; that is to say, a precept imposed upon the community, or upon a multitude of men.—*Ibid.,* § 8.

It pertains to this general or common character of law that the latter shall be instituted universally, without regard for persons and without unjust exceptions.—*Ibid.,* § 12.

Laws are not established for individuals, but for general purposes.—*Digest* I. iii. 8.

The law-maker who is to watch over the herds and maintain justice and the obligation of contracts, will never be able by making laws for all collectively, to provide exactly that which is proper for each individual. . . . but he will . . . legislate for the majority and in a general way only roughly for individuals, whether he issues written laws, or his enactments follow the unwritten traditional customs.—Plato, *The Statesman,* pp. 294–95.

No man is so wise as to be able to take account of every single case; wherefore he is not able sufficiently to express in words all those things that are suitable for the end he has in view. And even if a lawgiver were able to take all the cases into consideration, he ought not to mention them all, in order to avoid confusion: but should frame the law according to that which is of most common occurrence.—St. Thomas Aquinas, I.–II, qu. 96, art. 6, ad 3.

It is useless for your laws to be thus well and humanely framed for the protection of the humbler citizen, if those who disobey and flout them are not to incur the resentment of you who are, for the time being, entrusted with their administration.—Demosthenes, *Against Meidias,* § 57.

Laws, as Theophrastus has stated, ought to be established with respect to matters which often occur, and not with reference to such as occur unexpectedly.

In fact, what only happens once or twice, as Theophrastus says, legislators omit.

Laws are not established concerning matters which can only happen in a single instance.

For laws ought to be adapted to events which frequently and readily occur, rather than to such as rarely happen.—*Digest* I. iii. 3, 6, 4, 5.

Neither statutes nor decrees of the Senate can be written in such a way as to include all cases at any time which may arise; but it is sufficient if they include such as frequently occur.—*Ibid.,* 10.

Even they which brook it worst that men should tell them of their duties, when they are told the same by a law, think very well and reasonably of it. For why? They presume that the law doth speak with all indifferency; that the law hath no side-respect to their persons; that the law is as it were an oracle proceeded from wisdom and understanding.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. x. 7.

All matters cannot be specifically included in the laws or decrees of the Senate; but where their sense is clear in any instance, he who has jurisdiction of the same can apply it to others that are similar, and in this way administer justice.—*Digest* I. iii. 12.

But as to the directive force of law, the sovereign is subject to the law by his own will.[10]—St. Thomas Aquinas, I.–II, qu. 96, art. 5, ad 3.

A law dealing merely with a past action always has, of course, force against that action; but it never can have force against something in the future, which was not in being when the law was enacted.—Suárez, *De legibus,* Book VII, chap. vii, § 4.

Interpretation of Law

To know the laws is not to be familiar with their phraseology, but with their force and effect.—*Digest* I. iii. 17.

[10] See also the rubric, "Binding Force of Law," *infra,* p. 44.

Obscurity is reprehensible in many instances, but is especially so in the interpretation of laws; for there, as well as elsewhere, it is certainly proper to avoid strained and involved constructions, and seek for perspicuous expression. For the laws ought not to be mysteries which are beyond the comprehension of the public, but they should, on the contrary, be, as far as is possible, so clear that men, women, and children can easily understand them; for this will be conducive to better legislation and be productive of the greatest advantage to society.—*New Constitutions of the Emperor Leo*, Const. LXXVII.

The answers of jurists are the decisions and opinions of those who are authorized to define the law.—*Institutes of Gaius* I. 7.

The answers of Jurisconsults are the decisions and opinions of persons upon whom has been conferred authority to establish laws; for it was decided in ancient times that the laws should be publicly interpreted by those to whom the right to answer had been granted by the Emperor, and who were called jurisconsults, and the unanimous decisions and opinions of the latter had such force that according to the Constitutions, a judge was not permitted to deviate from what they had determined.—*Institutes* I. ii. 8.

As Pedius says, whenever anything has been introduced by law there is a good opportunity for extending it by interpretation or certain construction to other matters, where the same principle is involved.—*Digest* I. iii. 13.

Laws should be interpreted liberally, in order that their intention may be preserved.—*Ibid.*, 18.

In questions which are doubtful, the more benevolent opinions should always obtain the preference.—*Ibid.*, L. xvii. 56.

Truth, justice and the general good combine to demand that we consider not the exact terms in which any particular law was framed but its purpose and its intention.—Cicero, *Pro Aulius Caecina* xxviii. 81.

The expression, "According to the laws," must be understood to mean the spirit as well as the letter of the law.—*Digest* L. xvi. 6, § 1.

There is no doubt that he violates the law who, while obeying its letter attempts to destroy its spirit, for he will not escape the legal penalties prescribed, if, contrary to the intention of the law, he frequently and fraudulently takes advantage of its words.—*Code* I. xiv. 5.

If it be law which deems that the first consideration should be the substance, the meaning, and the spirit of the law, and lawlessness that it should be twisted round to suit the terms and the letter; then do you, gentlemen, decide to which of these two voices belongs more of honour and of expediency.—*Ibid.*, xxvii. 76–77.

It is possible that jurisprudence has been called the art of the good and the equitable because, in the interpretation of the laws, the good and the equitable should always be regarded; even if it be needful at times to temper the rigour of the words, in order not to depart from what is naturally equitable and good.—Suárez, *De legibus,* Book I, chap. ii, § 10.

When an instrument is ambiguous, the intention of the party who produced it should be considered.—*Digest* L. xvii. 96.

When the terms of the law are ambiguous, that meaning is to be accepted which is without incongruity; especially when the intention of the law can be ascertained therefrom.—*Ibid.*, I. iii. 19.

When words are ambiguous, their most probable or ordinary signification should be adopted.—*Ibid.*, L. xvii. 114.

There is nothing new in the interpretation of recent laws by former ones. Therefore, for the reason that it is the custom to interpret recent laws by former ones, it ought always to be understood that the principles of the laws are applicable to such persons or things as may at any time be of a similar character.—*Ibid.*, I. iii. 26–27.

Matters which have always had a certain interpretation should, under no circumstances, be changed.—*Ibid.*, 23.

It is not proper without taking into consideration an entire law either to decide, or give an opinion upon any particular portion of the same.—*Ibid.*, 24.

No principle of law or indulgent construction of equity permits matters which have been introduced for the welfare of mankind to be interpreted so rigorously as to be productive of hardship to them.—*Ibid.*, 25.

Every law is directed to the common weal of men, and derives the force and nature of law accordingly. Hence the jurist [Justinian, *Digest* I. iii. 25] says: "By no reason of law, or favour of equity, is it allowable for us to interpret harshly, and render burdensome, those useful measures which

have been enacted for the welfare of man."—St. Thomas Aquinas, I.–II, qu. 96, art. 6.

Necessity and utility [with respect to a law] should be thought of not as relating to the present time only, but to the unlimited or long continued period for which the law was made.—Cajetan, *On St. Thomas Aquinas*, I.–II, qu. 97, art. 2.

Binding Force of Law

Lex (law) is derived from *ligare* (to bind), because it binds one to act.—St. Thomas Aquinas, I.–II, qu. 90, art. 1.

Laws do not only teach what is good, but they enjoin it, they have in them a certain constraining force.—Hooker, *Of the Laws of Ecclesiastical Polity*, I. x. 7.

The chief effect of law consists in its binding power, and . . . all its other effects have their roots in that one alone.—Suárez, *De legibus*, Book I, chap. xviii, § 1.

All law is, as it were, a discovery, and a gift from God, a precept of wise men, the corrector of excesses of the will, the bond which knits together the fabric of the state, and the banisher of crime; and it is therefore fitting that all men should live according to it who lead their lives in a corporate political body. All are accordingly bound by the necessity of keeping the law.—John of Salisbury, *Policraticus* IV. ii.

Even as divine law has a binding force that renders transgressors guilty, so human law has the same force. . . . It matters not whether laws be human or divine, in so far as their binding force is concerned.—Vitoria, *De potestate civili*, no. 17.

Divine law binds one more firmly and forcefully. For in many cases divine law is binding where human law is not binding.—*Ibid.*, no. 16.

We must preserve the same attitude towards human and divine laws, in so far as their binding force is concerned; and . . . with regard to the manner and extent in which human laws are binding, we ought to consider them as being divine.—*Ibid.*, no. 18.

In laws, that which is natural bindeth universally, that which is positive not so.—Hooker, *Of the Laws of Ecclesiastical Polity*, I. x. 7.

Laws natural do always bind; laws positive not so, but only after they have been expressly and wittingly imposed.—*Ibid.*, xv. 1.

Civil laws are binding under pain of sin and guilt, in the same manner as ecclesiastical laws.—Vitoria, *De potestate civili,* no. 15.

The will of a superior to bind a subject to a given act, or—what is equivalent—to set a given matter within the sphere of obligatory virtue, is well denoted by the term "law."—Suárez, *De legibus,* Book I, chap. v, § 16.

Law in its mental aspect (so to speak), as it exists in the lawmaker himself, is the act of a just and upright will, the act whereby a superior wills to bind an inferior to the performance of a particular deed.—*Ibid.*, § 24.

Binding by means of law is a moral effect and one which depends upon the free will of the law-maker; therefore, in order that this binding effect may be accomplished, intention and will on the part of the legislator are necessary, for otherwise, the said effect would take place without intention, an inacceptable conclusion.—*Ibid.*, § 17.

Law depends for its existence on the legislator; for it will not be law unless it is promulgated by him who has authority; but it does not depend on him as regards its essence; for the binding force of the law is that in it which is eternal and immutable and a certain participation of the eternal law of God, which is the first and highest rule.—Bellarmine, *De laicis* xi (Murphy trans., p. 46).

Sometimes there is laid down a law which relates to the performance of an act, so that it renders the act itself obligatory, as is the case, for instance, with the law of almsgiving; whereas at other times a law is made which deals only with the special quality of the action, or its mode of performance, a law which, although it does not require the performance of the act, does nevertheless require that, if the said act is performed, a particular mode of execution shall be observed.—Suárez, *De legibus,* Book I, chap. i, § 8.

If it so happens . . . that a law is in itself useful, while some exceptional instance to which it applies involves injustice, the law would not on that account be entirely null, nor would it cease to bind the other subjects.—*Ibid.*, chap. ix, § 16.

Laws should not only be equitably enacted for the greatest good of the public, but those which have already been promulgated should be carefully observed and carried into effect, and the proper penalties inflicted upon

persons who violate them. For what advantage would be derived from the laws if they merely consisted of words, and no benefit was conferred upon Our subjects by their execution and effect?—*Constitutions of Justinian, Ninth Collection,* XLIV, Preface.

It is just that a Prince obey his own laws. For it will then appear that his laws ought to be kept by all, when he himself shows reverence for them. Princes are bound by their own laws, nor is it fitting in itself that they can condemn laws which they set up over their subjects. For the authority of their voice is just, if they do not suffer themselves to do what they forbid their people.—Gratian, *Decretum,* Part I, dist. ix, can. ii, citing Isidore, *De summo bono,* Book III, chap. liii.

The laws which are made by kings have the same force . . . as if they were made by the whole State; but the laws made by the State are binding upon all; therefore, even those laws which are made by the king, are binding upon the king himself.—Vitoria, *De potestate civili,* no. 21.

It is inherent in the nature of law that it shall be practicable . . . in cases of transgression or omission which cannot be reckoned as involving guilt or calling for punishment, it is impossible for law to intervene. For it is a part of the intrinsic nature of law that it shall contain some intrinsic element of obligation; but the omission to perform impossible deeds cannot be accounted guilt (any more than the performance of what is absolutely necessary is accounted deserving of a reward); and therefore, laws cannot be concerned with matters of this sort.—Suárez, *De legibus,* Book I, chap. ix, § 17.

No law is binding outside the limits of the territory of the superior or prince by whom it is decreed; so that the inhabitants of that country, generally speaking, do not sin if they violate the law in question while they are outside this territory.—*Ibid.,* Book III, chap. xxxii, § 3.

He who pronounces judgment outside the territory [of his jurisdiction] may be disobeyed with impunity.—*Decretals, Sext,* Book I, tit. ii, chap. ii.

Obedience to Law

In all well-attempered governments there is nothing which should be more jealously maintained than the spirit of obedience to law, more especially in small matters; for transgression creeps in unperceived and at last ruins the state.—Aristotle, *Politics,* V. viii. 2.

Good laws, if they are not obeyed, do not constitute good government. For there are two parts of good government: one is the actual obedience of citizens to the laws, the other part is the goodness of the laws which they obey; they may obey bad laws as well as good.—*Ibid.,* IV. viii. 5–6.

The Lacedaemonians . . . though they be freemen, they are not in all respects free; Law is the master whom they own, and this master they fear more than thy subjects fear thee.—*The History of Herodotus,* Book VII, chap. 104.

It is admitted that, next after the gods, the laws preserve the State. . . . If a man obeys the laws, respect and commend him for paying his contribution in full to the welfare of his fatherland; if he disobeys them, punish him. For everything done at the bidding of the laws is a contribution made to the State and the community.—Demosthenes, *Against Aristogeiton,* I. 22.

Since it is the laws that give us all our advantages, our rights, our freedom and our security—let us abide by the laws.—Cicero, *Pro Cluentio* lvii. 155.

When once a departure has been made from law and order, one can be positive of nothing.—Cicero, *Epistulae ad familiares* IX. xvi. 3.

Nothing is more destructive to governments, nothing is in such complete opposition to justice and law, nothing is less suitable for civilized men, than the use of violence in a State which has a fixed and definite constitution.—Cicero, *De legibus* III. xviii. 42.

Your indignation ought chiefly to be directed against those who vitiate the laws upon which depends the greatness, or the weakness, of the commonwealth.—Demosthenes, *Against Timocrates,* § 215.

Laws . . . are profitable to the community only so long as our public conduct conforms to the laws.—*Ibid.,* §§ 216–17.

Indeed, law would be useless if it were not observed.—Marsiglio of Padua, *Defensor pacis, Dictio* I, chap. xii.

If we use the word "fulfill" in a moral sense, it is not enough to do what the law commands; we must do it freely, and in human fashion.—Suárez, *De legibus,* Book II, chap. x, § 2.

Beyond doubt necessity often makes that lawful which otherwise would have been unlawful. . . .

Nor, again, is that reckoned a breach of law which is done under the stress of necessity and at the instance of public expediency.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book II, chap. v. §§ 8, 9.

Extreme necessity forms an exception to every law.[11]—Gentili, *De jure belli,* Book I, chap. xiii.

A just and unavoidable necessity makes anything lawful.[11]—*Ibid.,* Book III, chap. xii.

Because many act contrary to justice, justice is not therefore non-existent; and a law which many transgress is none the less a law.—*Ibid.,* Book I, chap. i.

One who attempts what is unlawful loses his lawful rights.—*Ibid.,* chap. xix.

Ignorance of Law

It is rather ignorance of the law than knowledge of it that leads to litigation.—Cicero, *De legibus* I. vi. 18.

The ordinary rule is, that ignorance of law injures anyone, but ignorance of fact does not.—*Digest* XXII. vi. 9.

Ignorance is classed as negligence.—*Ibid.,* L. xvii. 132.

The condition of doing what is unjust without committing a wrong is ignorance.—Aristotle, *Magna moralia* I. xxxiii. 24.

When ignorance is the cause of an action, the agent acts involuntarily and so is innocent; except when he is the cause of his own ignorance.—*Ibid.,* 25.

Even if the thing in question were in itself lawful, it would be sinful for any one to do it before deliberating and assuring himself of its lawfulness; and he would not be excused on the ground of ignorance, for the ignorance would manifestly not be invincible, since he does not do what in him lies to inquire into the lawfulness or unlawfulness of the matter.—Vitoria, *De Indis,* Sec. I, Introduction.

Ignorance of the law (though it be invincible) doth not excuse as to the law but in few cases; for every man is bound at his peril to take knowledge

[11] The ancient maxim (necessity knows no law) which Gentili restates has unfortunately been only too often invoked by individuals and by states without adequate justification.

what the law of the realm is, as well the law made by statute as the Common law: but ignorance of the deed, which may be called the ignorance of the truth of the deed, may excuse in many cases.—St. Germain, *Doctor and Student* (16th ed.), p. 250.

Alteration or Cessation of Law

Even when laws have been written down, they ought not always to remain unaltered. As in other sciences, so in politics, it is impossible that all things should be precisely set down in writing; for enactments must be universal, but actions are concerned with particulars. Hence we infer that sometimes and in certain cases laws may be changed; but when we look at the matter from another point of view, great caution would seem to be required. For the habit of lightly changing the laws is an evil, and, when the advantage is small, some errors both of lawgivers and rulers had better be left; the citizen will not gain so much by the change as he will lose by the habit of disobedience.—Aristotle, *Politics,* II. viii. 21–24.

Change, with respect to any law, indeed, may be conceived of in two ways: namely, as change through addition; or also as change through subtraction, or diminution.—Suárez, *De legibus,* Book II, chap. xiii, § 1.

Since a law is essentially perpetual, and is enacted for the sake of the community, it is manifestly incapable of lapsing through the disappearance of its efficient cause.—*Ibid.,* Book VI, chap. ix, § 1.

A law ceases to exist, when the reason for the law disappears in a general way; that is to say, more frequently [than not] in regard to the community as a whole.—*Ibid.,* § 5.

If the very reason which requires that the law be binding, that it endure, and that it serve the purpose for which it was created, should pass away; then all reason for creating or even for preserving the law in question likewise passes away.—Vitoria, *De potestate civili,* no. 22.

When the reason for a law ceases in general, the law is rendered useless by that very cessation, and its subject-matter becomes incapable of causing a just obligation; so that the will of the legislator must necessarily cease in consequence, partly because he has willed to impose a binding obligation justly and to such an extent as is licitly possibly (no other presumption being acceptable), and partly because, once the subject-matter of the law has changed, he would not be able to impose such an obligation

[through that law], even if he did so will. And if it is assumed (an additional point which was brought up in connection with this same argument) that when the first reason ceases to exist another reason takes its place, as is ordinarily held to occur in the case of taxes, the reply to this is that the first law has ceased to exist, and no other law has been made. Consequently, if the prince wishes to make the act in question obligatory on the basis of a new reason that arises, it will be necessary for him to legislate anew, or promulgate his wish to this effect; otherwise, and [merely] by the force of that earlier law [alone], his subjects cannot be bound.—Suárez, *De legibus*, Book VI, chap. ix, § 17.

No law can lapse of itself save through revocation by the lawgiver; unless it does so either because it was not of a permanent nature, being constituted rather for a definite period of time with the expiration of which the law itself also expires and wholly ceases to be, or else because some change occurs in the subject-matter, by reason of which change the law is now unreasonable and unjust although formerly it was just and wise.—*Ibid.*, Book II, chap. xiii, § 3.

The only way in which a law can cease to exist is as the result of a change in the object to which it relates.—*Ibid.*, Book VI, chap. ix, § 1.

Whenever there occurs . . . in the entire subject-matter of a law, a change resulting in a contrary effect, . . . under such circumstances the law *ipso facto* ceases to exist; inasmuch as these very circumstances divest it of its just character, wherefore it is divested of its character as law, since (as we have often said, quoting Augustine [*De libero arbitrio*, Book I, chap. v] an unjust law is not law. . . .

It is necessary, however, that such a change, effected universally in the entire subject-matter of the law, shall be a clear and evident fact; for, in doubtful cases, a law always retains its rightful force and foothold (so to speak) and the presumption is always in favor of the justice of the law.—*Ibid.*, § 3.

A law prescribing an essentially good act, establishing it as falling intrinsically within the subject-matter of virtue, does not cease to exist because some extrinsic end of the law wholly disappears.—*Ibid.*, § 9.

When the end of the law ceases, in a general sense, to exist, the act in question necessarily becomes useless with respect to the common good; therefore, it becomes for this very reason incapable of being rendered obligatory by human law, and the law [itself] consequently ceases *ipso facto*. . . .

From the foregoing, it follows, first, that a situation of this kind does not require a decree of the prince, in order that the law may permissibly be disobeyed after having ceased in the manner described, since [that] law fails, *ipso facto*. The sole requirement, then, is that this cessation shall be a matter of clear and public knowledge owing to evidence of a fact generally established throughout the state or community. For, by virtue of the very fact that the law ceases to exist in the aforesaid manner, it is no longer law; consequently, it is not of itself binding; and therefore, in order that its cessation may be effective with respect to the community, it suffices if [that cessation] is publicly known to the said community.—*Ibid.*, §§ 11, 12.

A law may prescribe many things or comprise various members, and may become useless in regard to one of these factors while it does not become useless in regard to the others. And in such a case, the same judgment applies to this part, whose reason has ceased to exist (provided that it is separable from the remainder of the law), as that which applies to a law in its entirety [when the reason therefor disappears]. . . . If, on the other hand, a law should embrace many factors in such a way that they were mutually inseparable and that there existed a practically indivisible obligation, since the good involved [depends on] the whole cause, and evil would result from defect [in the observance of any member—if, I say, the law were of this sort]—it would be necessary to consider carefully the question of whether or not a whole law becomes unjust or useless, or more harmful than beneficial, on account of a defect in one of its parts. If this is the case, the law as a whole will cease to exist. But if despite that defect, the law remains just, and more beneficial than harmful, it will not cease *ipso facto* before being repealed.—*Ibid.*, § 18.

If a law is to cease in an absolute sense, it is necessary that the reason for the law cease in a general sense, permanently. For if [that reason] seems to lapse thus for a limited time only, then the result will be a suspension of the obligation imposed by the law, rather than the extinction of the law itself; because the latter becomes useless or unjust, not absolutely, but merely for that temporary period. Accordingly, a limited cause [of cessation] produces a limited effect, so that the law is suspended, but not extinguished.—*Ibid.*

One should not, in this connexion, compare the cessation of a law with [the incurring of] a penalty. For, a penalty by its very nature is violent and is imposed from without, wherefore it inherently requires the action or concurrence of a judge, unless the contrary has been expressly provided by

law. Consequently, a penalty is not incurred *ipso facto,* independently of any legal declaration thereof; and even if it were incurred *ipso facto,* that would not prevent the passing of a declaratory sentence regarding the crime, save in cases in which the law does [specifically] preclude such a sentence or in which there is some other manifest [cause precluding it], since there always exists a presumption in favour of the accused to the effect that he is not liable to a penalty until he has been condemned. . . . the cessation of the law is not a violent occurrence; on the contrary, by means of that cessation the state is restored (so to speak) to its pristine status and liberty, while [the law] gives place to that [free status]; and therefore, there is no necessity for a decree of the sort described, to serve as a declaratory sentence.—Suárez, *De legibus,* Book VI, chap. ix, § 12.

Divine law is derived from God alone, and consequently may not be abolished nor abrogated by any one; whereas human law is, so to speak, established by man, and may therefore be abolished or annulled by man.—Vitoria, *De potestate civili,* no. 16.

A law is either derogated or abrogated. It is derogated when a part of it is stricken out; it is abrogated when it is entirely repealed.—*Digest* L. xvi. 102.

For the introduction of a custom abrogating law, a twofold will is needed, the one of the people, the other of the prince.—Suárez, *De legibus,* Book VII, chap. xviii, § 5.

Power to put aside a law, as it exists in the people taken alone, is rather a factual than a legal one; on the part of the prince, however, it is also a power to tolerate and give consent to the popular will. Thus, the authority to abolish law is complete in the combination of these two powers: because, in the last resort, its annulment is brought about by the same power that brought it into being.—*Ibid.,* § 3.

The act of repudiating a law by custom is not one of jurisdiction, or of public authority, but is rather one that proceeds from those under a duty of obedience to the law.—*Ibid.,* § 4.

Eternal Law

Eternal Law Defined

The world's first creation, and the preservation since of things created, what is it but only so far forth a manifestation by execution, what the

eternal law of God is concerning things natural? And as it cometh to pass in a kingdom rightly ordered, that after a law is once published, it presently takes effect far and wide, all states framing themselves thereunto; even so let us think it fareth in the natural course of the world: since the time that God did first proclaim the edicts of his law upon it, heaven and earth have hearkened unto his voice, and their labour hath been to do his will.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. iii. 2.

The eternal law, in so far as rational beings are thereby governed as moral beings and as members of society, has the true nature of law, and obedience in the true sense is paid to it.—Suárez, *De legibus,* Book II, chap. ii, § 13.

If the eternal law be thought of as having the true nature of law, in relation to the moral obligation of intellectual creatures, then it is the eternal will of God, according to which rational wills must operate, if they are to be virtuous.—*Ibid.,* chap. iii, § 8.

The eternal law, since it is a law of government or (so to speak) of operation by an artificer, may be said to have the nature of law in regard to the things governed, but not in relation to God Himself or His will.—*Ibid.,* chap. ii, § 9.

The eternal law is the divine order or will of God, which requires the preservation of natural order and forbids the breach of it.—St. Augustine, *Against Faustus the Manichaean,* XXII. xxvii.

Eternal law . . . as certainly exists in God, as does His providence over the universe; for the term refers simply to the essential principle of this providence, a principle dwelling in God, or to some element of that [providence]. . . .

The divine reason, in so far as it has the nature of law, establishes general rules, as it were, in accordance with which all things should be actuated and should operate; whereas providence makes specific disposition of particular things and acts, and is consequently the principle (so to speak) according to which the law is executed and applied. This explanation seems to be in harmony with the literal meaning of the terms themselves; for *lex* implies *ius,* which has been established in general, as we have observed above [Book I. chap. ii], while providence implies the care which should be taken with respect to particular acts. . . . In speaking of the eternal law in its widest sense, however, it may be said that all the effects of providence

are, in some manner, effects of the eternal law; since all the governmental force of divine providence is contained in principle (as it were) within the eternal law, and thus every effect of providence has its root (so to speak) within that law.—Suárez, *De legibus*, Book I, chap. iii, § 6; Book II, chap. iii, §§ 12, 14.

The eternal concept of the Divine law bears the character of an eternal law, in so far as it is ordained by God to the government of things foreknown by Him.—St. Thomas Aquinas, I.–II, qu. 91, art. 2, ad 1.

Scope of Eternal Law

Since all things subject to Divine providence are ruled and measured by the eternal law . . . it is evident that all things partake somewhat of the eternal law, in so far as, namely, from its being imprinted on them, they derive their respective inclinations to their proper acts and ends.—St. Thomas Aquinas, I.–II, qu. 91, art. 2.

There is nothing which can entirely escape the sway of the eternal law, whether in heaven, on earth, or in hell, whether in sinning or in acting righteously.—Suárez, *De legibus,* Book II, chap. ii, § 16.

There is no good action which does not come under the eternal law in its preceptive character.—*Ibid.,* § 15.

Every act, to the extent that it is a good act, must be in conformity with the eternal law; that is to say, with the eternal law as it prescribes a due method of performance.—*Ibid.,* Book I, chap. i, § 8.

Under varying aspects, the eternal law may be spoken of as one or as manifold in nature. . . . Neither is this doctrine surprising; for the natural law [also] is spoken of as one, yet it contains many precepts; although, in the case of the natural law, this is true in a very different sense, for the natural law has the unity characteristic of a collection, whereas the unity of the eternal law is derived from absolute simplicity.—*Ibid.,* Book II, chap. iii, § 16.

Whatever is to any extent contrary to reason, is to the same extent contrary to the eternal law.—*Ibid.,* chap. ix, § 2.

The law whereby he [God] worketh is eternal, and therefore can have no shew or colour of mutability. . . . This law . . . we may name eternal,

being *that order which God before all ages hath set down with himself, for himself to do all things by.*

I am not ignorant that by law eternal the learned for the most part do understand the order, not which God hath eternally purposed himself in all his works to observe, but rather that which with himself he hath set down as expedient to be kept by all his creatures, according to the several condition wherewith he hath endued them. They who thus are accustomed to speak apply the name of *Law* unto that only rule of working which superior authority imposeth; whereas we somewhat more enlarging the sense thereof term any kind of rule or canon, whereby actions are framed, a law. Now that law which, as it is laid up in the bosom of God, they call *eternal,* receiveth according unto the different kinds of things which are subject unto it different and sundry kinds of names. That part of it which ordereth natural agents we call usually nature's law; that which Angels do clearly behold and without any swerving observe is a law *celestial* and heavenly; the law of *reason,* that which bindeth creatures reasonable in this world, and with which by reason they may most plainly perceive themselves bound; that which bindeth them, and is not known but by special revelation from God, *Divine* law; *human* law, that which out of the law either of reason or of God men probably gathering to be expedient, they make it a law. All things therefore, which are as they ought to be, are conformed unto this *second law eternal;* and even those things which to this eternal law are not conformable, are notwithstanding in some sort ordered by *the first eternal law.* For what good or evil is there under the sun, what action correspondent or repugnant unto the law which God hath imposed upon his creatures, but in or upon it God doth work according to the law which himself hath eternally purposed to keep; that is to say, *the first law eternal?*—Hooker, *Of the Laws of Ecclesiastical Polity,* I. ii. 6; *ibid.,* iii. 1.

Eternal Law as the Source of All Law

It has been the opinion of the wisest men that Law is not a product of human thought, nor is it any enactment of peoples, but something eternal which rules the whole universe by its wisdom in command and prohibition. Thus they have been accustomed to say that Law is the primal and ultimate mind of God, whose reason directs all things either by compulsion or restraint.—Cicero, *De legibus* II. iv. 8.

[Of] the individual kinds [of law] . . . the eternal law has first place, on account of its dignity and excellence, and also for the reason that it is the source and origin of all laws.—Suárez, *De legibus,* Book II, Introduction.

All laws, in so far as they partake of right reason, are derived from the eternal law. Hence Augustine[12] says (*De lib. arb.* 1. 6) that "in temporal law there is nothing just and lawful, but what man has drawn from the eternal law."—St. Thomas Aquinas, I.–II, qu. 93, art. 3.

Law eternal is called the first law: and it is well called the first, for it was before all other laws, and all other laws be derived of it.—St. Germain, *Doctor and Student* (16th ed.), p. 3.

The author of the temporal laws, if he is a good and wise man, consults the eternal law itself, concerning which no soul is permitted to judge, that he may discern for temporal affairs, according to its immutable rules, what ought to be commanded and forbidden.—St. Augustine, *On the True Religion,* i. 31.

The eternal law is essentially law, while every other law exists by participation therein; hence, necessarily, every other law must be an effect of the eternal. It may also be noted that there are two requisites for law: one is that it be just and congruous with reason; the other, that it possess efficacious binding force; and all created right reason is a partaker of that divine light which has been shed upon us, while all human power is bestowed from above and comes from the Lord God; therefore, all law existing among men is derived from the eternal law.—Suárez, *De legibus,* Book II, chap. iv, § 5.

He who disobeys a law, whether natural or political, whether Divine or human, sins against the eternal law, since all law is a participation of the eternal law.—Bellarmine, *De laicis* xi (Murphy trans., p. 46).

Easier a great deal it is for men by law to be taught what they ought to do, than instructed how to judge as they should do of law: the one being a thing which belongeth generally unto all, the other such as none but the wiser and more judicious sort can perform. Yea, the wisest are always touching this point the readiest to acknowledge, that soundly to judge of a law is the weightiest thing which any man can take upon him. But if we will give judgment of the laws under which we live, first let that law eternal be always before our eyes, as being of principal force and moment to breed in religious minds a dutiful estimation of all laws, the use and benefit whereof we see; because there can be no doubt but that laws ap-

[12] The passage from St. Augustine here referred to is quoted at some length under the rubric "Scope and Purpose of Natural Law," *infra.*

parently good are (as it were) things copied out of the very tables of that high everlasting law.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. xvi. 2.

Every specific law presupposes the existence of something which is law in essence; and this essential law is eternal.—Suárez, *De legibus,* Book II, chap. i, § 3.

Promulgation and Binding Force of Eternal Law

The eternal decree of God is immutable and is, without any change on its part, of binding force at its own proper time; while the decree of man is changeable, wherefore, as long as it is not promulgated in the form of law, it has more the character of a proposal to enact a law than that of a law firmly established and enacted.—*Ibid.,* Book II, chap. i, § 11.

The eternal law never binds through itself and apart from every other law, and . . . on the contrary, it must necessarily be united with some other law in order actually to bind. For it never binds thus, unless it is actually and externally promulgated; and it is not promulgated, save through the promulgation of some divine or human law. So that we may also say that the eternal law never binds directly, but on the contrary, does so through the medium of some other law.—*Ibid.,* § 10.

Although the eternal law contributes to the binding obligation, in the character of a universal cause, the proximate cause of the obligation is nevertheless human law; for it binds not only as a sign of the divine will, but proximately, as the sign of a human will. Accordingly, in the case of human laws the eternal law binds less proximately, so to speak.—*Ibid.*

Ordinarily . . . God does not bind men by the eternal law, save through the medium of a law which is external and which constitutes a participation in and manifestation of the eternal law. So it is that, when other laws are promulgated to men, the eternal law itself is at the same time externally promulgated. Accordingly, in the case of this law, in so far as it is eternal, its promulgation, properly speaking, has no place.—*Ibid.,* chap. i, § 11.

We may, indeed, distinguish two aspects of the eternal law. In one aspect, it is eternal, and being so, is independent of external promulgation, neither has it relation to creatures existing for the moment. In the other aspect, this law is promulgated and binding at the present time, and consequently has a temporal relation to creatures existing at the time. In this sense, it may be called divine. Accordingly, this latter term connotes the

condition of adequate external communication and promulgation. That same law, indeed, may more properly be called divine law, when it has external existence in the subjects and servants of God, that is to say, in any knowledge or sign whereby it is adequately promulgated to them. In this sense, we may assert that the divine law is a partaker in the nature of the eternal law, more excellent than any other: partly because the eternal law is more perfectly embodied in it; partly, also, because the divine law emanates more directly from the eternal; and finally, because the binding force of the divine law proceeds immediately from the same divine authority. —Suárez, *De legibus,* Book II, chap. iv, § 7.

Human Knowledge of Eternal Law

Many of the philosophers . . . have attained, through the effects of the eternal law, a conception of that law as existing in God Himself, and consequently they have perceived that every righteous and true law established among men emanates from the eternal, either immediately as the natural law does, or through the medium of the latter, as is the case with human laws.—*Ibid.,* § 4.

All men necessarily behold within themselves some sort of participation in the eternal law, since there is no rational person who does not in some manner judge that the virtuous course of action must be followed and the evil avoided; and in this sense, it is said that men have some knowledge of the eternal law. . . .

Nevertheless, not all men have knowledge of that law formally, from the standpoint of their participation therein; so that the eternal law is not known to all by such direct knowledge as to be the formal object thereof. Yet some men attain to this knowledge either through natural reasoning, or more perfectly through the revelation of faith; and accordingly, I have said that the eternal law is known to some men only in laws that are secondary to it, whereas to others, it is known not only *in* those laws but also *through* them.—*Ibid.,* § 9.

Every knowledge of truth is a kind of reflection and participation of the eternal law, which is the unchangeable truth.—St. Thomas Aquinas, I.–II, qu. 93, art. 2.

All men know the truth to a certain extent, at least as to the common principles of the natural law: and as to the others, they partake of the knowledge of truth, some more, some less; and in this respect are more or less cognisant of the eternal law.—*Ibid.*

The eternal law is known to men in this life, not through itself, but either in other laws or through them.—Suárez, *De legibus,* Book II, chap. iv, § 9.

When the law eternal or the will of God is known to his creatures reasonable by the light of natural understanding, or by the light of natural reason, that is called the law of *reason:* and when it is shewed by heavenly revelation in such manner as hereafter shall appear, then it is called the *law of God:* and when it is shewed unto him by the order of a prince, or of any other secondary governor that hath a power to set a law upon his subjects, then it is called the *law of man,* though originally it be made of God. For laws made by man that hath received thereto power of God, be made by God. Therefore the said three laws, that is to say the law of reason, the law of God, and the law of man, the which hath several names after the manner as they be shewed to man, be called in God one law eternal.—St. Germain, *Doctor and Student* (16th ed.), p. 4.

Divine Law

By the natural law the eternal law is participated proportionately to the capacity of human nature. But to his supernatural end man needs to be directed in a yet higher way. Hence the additional law [divine law] given by God, whereby man shares more perfectly in the eternal law.—St. Thomas Aquinas, I.–II, qu. 91, art. 4, ad 1.

The divine law, is of a general nature, and includes only certain self-evident principles of conduct, extending, at most, to those points which follow necessarily and by a process of obvious inference from the said principles; whereas, in addition to such points, many others are necessarily involved in the case of a human commonwealth in order that it may be preserved and rightly governed, so that it was necessary for human reason to determine more particularly certain points relating to those matters which cannot be defined through the natural reason alone, a determination that is effected by means of human law; and therefore, such law was most necessary.—Suárez, *De legibus,* Book I, chap. iii, § 18.

In moral actions, divine law helpeth exceedingly the law of reason to guide man's life; but in supernatural it alone guideth.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. xvi. 5.

The canon laws . . . relate to the supernatural order, both because they are derived from the power given to Peter for the feeding of Christ's flock

[John 21: 15, 16], and also because they trace their origin to the principles of divine law, and imitate that law in so far as is possible and expedient.—Suárez, *De legibus,* Preface.

Natural Law

Natural Law Defined

True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment.—Cicero, *De re publica* III. xxii. 33.

The natural law is the common law of all the nations, in that it is everywhere observed by natural instinct, and not by any ordinance.—Isidore, *Etymologies,* Book V, chap. iv, § 1.

There is righteous law which is called common law and natural right; there is another law which is termed law established by [human] will, that is, by the king or prince and by all the people. . . . Those things are naturally righteous which natural reason teaches. Therefore it is said that natural right and natural law possess the same moral excellence and the same power everywhere, although they are called by various names in various lands.—Egidio Colonna, *Li Livres du gouvernement des rois,* Book III, Part II, chap. xxii.

Man has a natural inclination to know the truth about God, and to live in society: . . . and whatever pertains to this inclination belongs to the natural law.—St. Thomas Aquinas, I.–II, qu. 94, art. 2.

The precepts of the natural law are many in themselves, but are based on one common foundation.—*Ibid.,* ad 2.

All these precepts of the law of nature have the character of one natural law, inasmuch as they flow from one first precept.—*Ibid.*, ad 1.

This is the first precept of law, that *good is to be done and ensued, and evil is to be avoided*. All other precepts of the natural law are based upon this.—*Ibid.*, art. 2.

The law of nature is that which is contained in the law and in the Gospel, by which one is ordered to do to another what he wishes to be done to himself, and is forbidden from doing to another what he does not wish to be done to himself. Whence Christ says in the Gospel, "Therefore all things whatsoever ye would men should do to you, do ye even so to them: for this is the law and the prophets." [Matt. 7: 12.]—Gratian, *Decretum*, Part I, dist. i.

Gratian . . . asserts that . . . the whole of the natural law is virtually contained in that principle which is laid down in the first of the Gospels (*Matthew*, Chap. vii [, v. 12]): "Whatsoever you would that men should do to you, do you also to them." This last text especially, seems to have been in Gratian's mind; so that his words should be assembled as follows [*Decretum*, Pt. I, dist. i]: The natural law is the rule whereby each of us is commanded to do to another, what he would wish done to himself, a rule which is contained in the Law and the Gospel.—Suárez, *De legibus*, Book II, chap. vii, § 9.

The knowledge of that which man is in reference unto himself, and other things in relation unto man, I may justly term the mother of all those principles, which are as it were edicts, statutes, and decrees, in that law of nature, whereby human actions are framed.—Hooker, *Of the Laws of Ecclesiastical Polity*, I. viii. 6.

We do not . . . so far extend the law of reason, as to contain in it all manner laws whereunto reasonable creatures are bound, but (as hath been showed), we restrain it to those only duties, which all men by force of natural wit either do or might understand to be such duties as concern all men. "Certain half-waking men there are" (as Saint Augustine[13] noteth [*De doct. Christ.* Book III, chap. 14]) "who neither altogether asleep in folly, nor yet thoroughly awake in the light of true understanding, have thought that there is not at all any thing just and righteous in itself: but look, wherewith nations are inured, the same they take to be right and just.

[13] This passage from St. Augustine is also quoted, *supra*, in slightly different language, under the rubric "Morality and Law."

Whereupon their conclusion is, that seeing each sort of people hath a different kind of right from other, and that which is right of its own nature must be everywhere one and the same, therefore in itself there is nothing right. These good folk," saith he, "(that I may not trouble their wits with rehearsal of too many things,) have not looked so far into the world as to perceive that 'Do as thou wouldest be done unto,' is a sentence which all nations under heaven are agreed upon. Refer this sentence to the love of God, and it extinguisheth all heinous crimes; refer it to the love of thy neighbour, and all grievous wrongs it banisheth out of the world." Wherefore as touching the law of reason, this was (it seemeth) Saint Augustine's judgment: namely, that there are in it some things which stand as principles universally agreed upon; and that out of those principles, which are in themselves evident, the greatest moral duties we owe towards God or man may without any great difficulty be concluded.—Hooker, *ibid.*, 10.

It is to be understood, that the *law of nature* may be considered in two manners, that is to say, generally and specially. When it is considered generally, then it is referred to all creatures, as well reasonable as unreasonable: for all unreasonable creatures live under a certain rule to them given by nature, necessary for them to the conservation of their being. But of this law it is not our intent to treat at this time. The law of nature specially considered, which is also called the *law of reason,* pertaineth only to creatures reasonable, that is, man, which is created to the image of God.

And this law ought to be kept as well among Jews as Gentiles, as among christian men: and this law is always good and righteous, stirring and inclining a man to good, and abhorring evil. And as to the ordering of the deeds of man, it is preferred before the law of God, and it is written in the heart of every man, teaching him what is to be done, and what is to be fled: and because it is written in the heart, therefore it may not be put away, ne it is never changeable by no diversity of place, ne time: and therefore against this law, prescription, statute nor custom may not prevail: and if any be brought in against it, they be not prescriptions, statutes nor customs, but things void and against justice. And all other laws, as well the laws of God as the acts of men, as other, be grounded thereupon.—St. Germain, *Doctor and Student* (16th ed.), p. 5.

[Natural] law is the proximate rule of moral goodness.—Suárez, *De legibus,* Book II, chap. ix, § 2.

We assume, in accordance with the common opinion found not only in the words of the Doctors, but also in the canon and the civil law, that the

body of natural law (*ius*) is a true body of law, and that particular natural law (*lex*) is true law.—*Ibid.*, chap. v, § 5.

The natural law is truly law, inasmuch as all the Fathers, theologians, and philosophers so speak and think of it.—*Ibid.*, chap. vi, § 6.

To the natural law belongs everything to which a man is inclined according to his nature.—St. Thomas Aquinas, I.–II, qu. 94, art. 3.

The natural law is that law which springs not from [human] opinion, but from the evidence afforded by nature.—Suárez, *De legibus*, Book II, chap. xix, § 4.

It is in the actual judgment of the mind that natural law, in the strictest sense, exists.—*Ibid.*, chap. v, § 14.

With respect to any one individual, there are many natural precepts; but . . . from all of these there is formed one unified body of natural law.—*Ibid.*, chap. viii, § 2.

Natural law is a unified whole with respect to all men and in all places. . . . The rational basis of this position is that the law in question is (so to speak) a peculiar quality accompanying not the particular rational faculty of any given individual, but rather that characteristic nature which is the same in all men.—*Ibid.*, § 5.

The natural law is a single law with respect to all times and every condition of human nature. . . . The reason . . . is . . . that the law in question is the product, not of any [particular] state in which human nature is found, but of human nature itself in its essence.—*Ibid.*, § 8.

The natural law in so far as relates to its substance is one and the same among all men, but . . . in so far as concerns the knowledge of it, that law is not complete (so to speak) among all.—*Ibid.*, § 5.

Although a given condition may demand the application of one precept and not of another, the natural law is nevertheless always the same, and comprises the same precepts; since the latter are either principles, or else conclusions derived therefrom by a necessary inference, and consequently possess a necessary quality of which they are not devoid with respect to any condition whatsoever.

Finally, it may be asserted that in connexion even with the natural law one may consider either its negative or its affirmative precepts. The negative precepts must necessarily be and have always been the same for all con-

ditions [of human nature]; for they prohibit actions intrinsically evil, which are therefore evil for every such condition. Furthermore, they are binding without intermission, and consequently, binding also for every [human] condition, whenever their proper subject-matter shall be involved.

The affirmative precepts, on the other hand, in like manner prescribe actions which are righteous of themselves, and consequently possess always this same righteous nature; and, nevertheless, since they are not binding without intermission, it may be that in connexion with one particular [human] state there will arise occasions to observe certain of these precepts, and in connexion with another [human state], occasions for the observance of other precepts. Yet this fact does not suffice to justify the assertion that the law itself is diversified in character. For even in the corrupted state of [human] nature, a time of peace is one thing, a time of war is quite another thing, and during these times respectively, diverse precepts must be observed. Furthermore, the art of medicine is one and the same art, even though it prescribes that certain things shall be done in time of health, and other things in time of illness. It is in such a sense, then, that the natural law is always one and the same.—Suárez, *De legibus,* Book II, chap. viii, § 9.

The law which is written in those books of Justinian is not merely that of the state, but also that of the nations and of nature; and with this last it is all so in accord, that if the empire were destroyed, the law itself, although long buried, would yet rise again and diffuse itself among all the nations of mankind.—Gentili, *De jure belli,* Book I. chap. iii.

Relation of Natural Law to Eternal Law

The natural law is nothing else than the rational creature's participation of the eternal law.—St. Thomas Aquinas, I.–II, qu. 91, art. 2.

The natural law . . . is nothing other than a natural participation (so to speak) in the eternal law.—Suárez, *De legibus,* Book II, chap. v, § 10.

The natural law is the first system whereby the eternal law is applied or made known to us.—*Ibid.,* Introduction.

The eternal law . . . is not the proximate rule for man, save in so far as it is explained by the natural law.—*Ibid.,* chap. ix, § 2.

Relation of Natural Law to Divine Law

Since . . . by the natural law nothing else is commanded but what God wishes to be done, and nothing is forbidden but what God prohibits doing;

and next, since in the canonical writings there is nothing but what may be found in the divine laws; but the divine laws are in agreement with nature: it is clear that whatsoever is proven to be contrary to the divine will or the canonical writings, the same is found to be opposed to the natural law. Whence, the natural law ought to be preferred to whatsoever things are considered lower in value than the divine will, or the canonical writings, or the divine laws. Therefore, ordinances, whether ecclesiastical or secular, if they are proven to be contrary to the natural law, ought to be entirely repealed.—Gratian, *Decretum,* Part I, dist. ix, can. ix.

The natural law is truly and properly divine law, of which God is the Author.—Suárez, *De legibus,* Book II, chap. vi, § 13.

The natural law is also divine, being decreed, as it were, directly by God Himself.—*Ibid.,* Book I, chap. iii, § 9.

That positive law is called divine which has been established directly by God Himself, and added to the whole body of natural law.—*Ibid.,* § 14.

Although the natural law, as properly a divine law, includes the commands and prohibitions of God, it nevertheless assumes that there dwells in its subject-matter an intrinsic righteousness or wickedness, wholly inseparable from that matter.—*Ibid.,* Book II, chap. xv, § 4.

Without doubt, God is the efficient cause and the teacher (as it were) of the natural law; but it does not follow from this, that He is its legislator, for the natural law does not reveal God issuing commands, but [simply] indicates what is in itself good or evil, just as the sight of a certain object reveals it as being white or black, and just as an effect produced by God, reveals Him as its Author, but not as Lawgiver.—*Ibid.,* chap. vi, § 2.

This law of reason differeth from the law of God in two manners. For the law of God is given by revelation of God; and this law is given by a natural light of understanding. And also the law of God ordereth a man of itself, by a nigh way, to the felicity that ever shall endure; and the law of reason ordereth a man to the felicity of this life.—St. Germain, *Doctor and Student* (16th ed.), p. 6.

Natural Law as Right Reason

The first rule of reason is the law of nature.—St. Thomas Aquinas, I.–II, qu. 95, art. 2.

To the natural law belong those things to which a man is inclined naturally: and among these it is proper to man to be inclined to act according to reason.—St. Thomas Aquinas, I.–II, qu. 94, art. 4.

The laws of well-doing are the dictates of right reason.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. vii. 4.

The natural light of the intellect—which is inherently to prescribe what must be done—may be called the natural law, since men retain that law in their hearts, although they may be engaged in no [specific] act of reflection or judgment.—Suárez, *De legibus,* Book II, chap. v, § 14.

All those things which natural enlightenment makes evident, pertain to the natural law.—*Ibid.,* chap. vii, § 4.

The exercise of dominion and the function of ruling are characteristic of law; and in man, these functions are to be attributed to right reason, that he may be rightly governed in accordance with nature; therefore, the natural law must be constituted in the reason, as in the immediate and intrinsic rule of human actions.—*Ibid.,* chap. v, § 12.

Natural law resides in man, since it does not reside in God, being temporal and created, nor is it external to man, since it is written not upon tablets but in the heart; neither does it dwell immediately within human nature itself, since we have proved that it does not do so; nor is it in the will, since it does not depend upon the will of man, but, on the contrary, binds and (as it were) coerces his will; hence, this natural law must necessarily reside in the reason.—*Ibid.*

The natural law . . . being revealed to every man by the light of reason . . . it is established, not for any one individual as such (not because he is Peter, for example), but for each person as a human being.—*Ibid.,* Book I, chap. vi, § 18.

The legal effects . . . in the case of natural law, proceed immediately from a dictate of the reason, for that dictate directs and binds and is a rule of conscience which censures or approves what is done, so that law of the kind in question consists in the said dictate.—*Ibid.,* Book II, chap. v, § 12.

Those things which are recognized by means of natural reason, may be divided into three classes. First, some of them are primary and general principles of morality, such principles as: "one must do good, and shun

evil", "do not to another that which you would not wish done to yourself", and the like. There is no doubt but that these principles pertain to the natural law. Again, there are certain others, more definite and specific, which, nevertheless, are also self-evident truths by their very terminology. Examples of the second group are these principles: "justice must be observed"; "God must be worshipped"; "one must live temperately"; and so forth. Neither is there any doubt concerning the fact that this group comes under the natural law, a point which will become evident, *a fortiori,* as a result of the discussion that is to follow. In the third class, we place those conclusions which are deduced from natural principles by an evident inference, and which cannot become known save through rational reflection. Of these conclusions, some are recognized more easily than others, and by a greater number of persons; as, for example, the inferences that adultery, theft, and similar acts are wrong. Other conclusions require more reflection, of a sort not easily within the capacity of all, as is the case with the inferences that . . . usury is unjust, that lying can never be justified, and the like. . . . Strictly speaking, the natural law works more through these proximate principles or conclusions than through universal principles; for a law is a proximate rule of operation, and the general principles above mentioned are not rules save in so far as they are definitely applied by specific rules to the individual sorts of acts or virtues.—*Ibid.*, chap. vii, §§ 5, 7.

Natural reason is evident of itself and therefore those who rely upon it are content merely to say: "This is perfectly clear from nature itself", "It is evident from natural reason", "He has a knowledge derived from nature", "Nature shows"; and there are many remarks of the same kind. So also "Just by nature", "Nothing is so completely in harmony with natural justice", "It is contrary to nature", "Nature does not allow", and hundreds of other phrases. . . .

These things are so well known, that if you should try to prove them, you would render them obscure. At any rate, it would be useless to prove what is already manifest. Thus all the interpreters of the law say that things which are well known ought to be stated, but not demonstrated. It has been made sufficiently clear that natural law does exist, and that if you should transgress it in any particular, you would desire to conceal the act through very shame. Or if you should go so far in shamelessness as to confess and try to justify the action, you would have the same feeling that one has towards those statements which are called axioms, namely, you would instinctively feel that the act could not be justified. . . .

. . . Natural reason varies constantly according to men's intelligence and many are led not so much by that reason as by fantasy. But the laws which were laid down by the philosophers and approved by the judgement of every age undoubtedly possess natural reason.—Gentili, *De jure belli,* Book I, chap. i.

It is not used among them that be learned in the laws of *England* to reason what thing is commanded or prohibited by the law of nature, and what not, but all the reasoning in that behalf is under this manner. As when any thing is grounded upon the law of nature, they say, that reason will that such a thing be done; and if it be prohibited by the law of nature, they say it is against reason, or that reason will not suffer that to be done. . . . It is to be noted, that all the deriving of reason in the law of *England* proceedeth of the first principles of the law, or of something that is derived of them: and therefore no man may rightwisely judge, ne groundly reason in the laws of *England,* if he be ignorant in the first principles.—St. Germain, *Doctor and Student* (16th ed.), p. 16.

Immutability of Natural Law

And she who sits enthroned with gods below,
Justice, enacted not these human laws.
Nor did I deem that thou, a mortal man,
Could'st by a breath annul and override
The immutable unwritten laws of Heaven.
They were not born to-day nor yesterday;
They die not; and none knoweth whence they sprang.

—Sophocles, *Antigone,* lines 450–59.

Natural law obtains primacy . . . both by reason of its age, and its dignity. It takes its origin from the creation of the rational being and does not vary from age to age, but remains unchangeable.—Gratian, *Decretum,* Part I, dist. v, pars. 1.

Natural laws that are observed without distinction by all nations and have been established by Divine Providence remain always fixed and unchangeable; but those which every State establishes for itself are often changed either by the tacit consent of the people, or by some other law subsequently enacted.—*Institutes* I. ii. 11.

There belong to the natural law, first, certain most general precepts, that are known to all; and secondly, certain secondary and more detailed pre-

cepts, which are, as it were, conclusions following closely from first principles. As to those general principles, the natural law, in the abstract, can in nowise be blotted out from men's hearts. But it is blotted out in the case of a particular action, in so far as reason is hindered from applying the general principle to a particular point of practice. . . . As to the other, *i.e.*, the secondary precepts, the natural law can be blotted out from the human heart, either by evil persuasions, just as in speculative matters errors occur in respect of necessary conclusions; or by vicious customs and corrupt habits.—St. Thomas Aquinas, I.–II, qu. 94, art. 6.

The precepts of the natural law are necessary and characterized by eternal truth, since (as I have said above) that law comprises self-evident moral principles together with all the conclusions—and only those conclusions—which are drawn therefrom by a process of necessary inferences, whether proximately or through a series of such inferences. But all of these elements are eternally true, [since] this truth in the principles does not subsist apart from the truth of the conclusions in question, the principles themselves being necessarily true by their very definition. Therefore, all of the precepts in question are of a perpetual character. And, consequently, they cannot cease to be, solely through lapse of time.—Suárez, *De legibus,* Book II, chap. xiii, § 3.

Properly speaking the natural law cannot of itself lapse or suffer change, whether in its entirety, or in its individual precepts, so long as rational nature endures together with the use of reason and freedom [of will].—*Ibid.*, § 2.

In the case of every precept of natural law, God is the Lawgiver; and man cannot change a law that God has established, since an inferior cannot prevail as against his superior.—*Ibid.*, chap. xiv, § 8.

The natural law, in all its precepts, relates to the natural qualities of mankind; and man cannot change the nature of things.—*Ibid.*

The natural law, in so far as its precepts are concerned, is by its very nature unchangeable; and men cannot change that which is unchangeable. —*Ibid.*

The natural law is the foundation of human law . . . therefore, human law cannot derogate from natural law . . . if it did so, it would destroy its own foundation and consequently itself.—*Ibid.*

Every judgment derived from the natural law is of such a character that it rests either upon self-evident principles or upon deductions necessarily drawn therefrom; and, therefore, however much things themselves may vary, there can never be a variation in such judgment.—Suárez, *De legibus*, Book II, chap. xiii, § 3.

No human power, even though it be the papal power, can abrogate any proper precept of natural law, nor truly and essentially restrict such a precept, nor grant a dispensation from it.—*Ibid.*, chap. xiv, § 8.

No precept of the natural law can be totally eradicated, even through ignorance. I shall add, moreover, that, through error or ignorance, the law does not change in itself, but is obscured or not known, which is a very different matter.—*Ibid.*, chap. xiii, § 10.

The positive law . . . may be abrogated; whereas, with regard to the natural law, that is by no means the case, since, on the contrary, it is liable to change only . . . through changing subject-matter; so that a given action is withdrawn from the obligation imposed by the natural law [with respect to it], not because the law is abolished or diminished, since it always is and has been binding in this sense, but because the matter dealt with by the law is changed.—*Ibid.*, § 6.

The precepts of the natural law which depend for their preceptive binding force upon a prior consent of the human will, and upon the efficacy of that will to issue in some action, may sometimes be subjected to human dispensation, involving not a direct and absolute abolition of the obligation of natural law but a certain remission that affects the subject-matter of the precept in question . . . although such relaxation is (strictly speaking) a dispensation in fact rather than in law. . . .

The said precepts, when viewed in themselves, possess an intrinsic rectitude that can never be abolished or violated if they are applied to their [proper] subject-matter; as is evident in the case of precepts such as the rule that good faith must be observed towards God and man.—*Ibid.*, chap. xiv, § 11.

When the natural law is binding by virtue of reason alone in a matter which is independent of prior human consent, not only can there be no necessity for dispensation, but dispensation is even repugnant to reason.—*Ibid.*, § 25.

Through human law, whether it be the *ius gentium* or the civil law, there may be effected in the subject-matter of the natural law a change of such

sort that, by reason thereof, the obligation imposed by natural law will also change. . . . the rational basis of the said assertion is the fact that such a mode of change is not inconsistent with the necessary and unchangeable character of the natural law; and that, for the rest, it is convenient and frequently necessary for men, in accordance with the various changes of estate which befall them.—*Ibid.*, § 12.

The natural law discerns the mutability in the subject-matter itself, and adapts its own precepts to this mutability, prescribing in regard to such subject-matter a certain sort of conduct for one condition, and another sort of conduct for another condition; so that the law in itself remains at all times unchanged, although, according to our manner of speaking and by an extrinsic attribution, it would seem, after a fashion, to undergo change. —*Ibid.*, chap. xiii, § 9.

A change in the natural law may be understood in two ways. First, by way of addition . . . since many things for the benefit of human life have been added over and above the natural law, both by the Divine law and by human laws.

Secondly, a change in the natural law may be understood by way of subtraction, so that what previously was according to the natural law, ceases to be so.

The possession of all things in common and universal freedom are said to be of the natural law, because, to wit, the distinction of possessions and slavery were not brought in by nature, but devised by human reason for the benefit of human life. Accordingly the law of nature was not changed in this respect, except by addition.—St. Thomas Aquinas, I.–II, qu. 94, art. 5, ad 3.

Among the precepts of natural law, there are certain precepts—dealing with pacts, agreements, obligations—which are introduced through the will of men: for example, the laws relating to the observance of vows and of human promises, whether these be made in simple form or confirmed by oath; and the same is true of other contracts, according to the particular characteristics of each; and true, also, of rights, natural and legal, arising therefrom.

There are other natural laws . . . which are directly binding, in their very subject-matter and independently of any prior consent by human will. . . . In both kinds of precepts there is involved the same necessity in so far as concerns the formal character of law, and, consequently, there are the same uniformity and immutability; but with respect to the subject-matter, the

second group of precepts possesses a greater degree of immutability, since they have not for their subject-matter (so to speak) human free will, which is exceedingly changeable and frequently requires correction and alteration. —Suárez, *De legibus,* Book II, chap. xiv, § 7.

The difference between the preceptive law and the law concerning dominion is that the former kind comprehends rules and principles for right conduct which involve necessary truth, and are therefore immutable, since they are based upon the intrinsic rectitude or perversity of their objects; whereas the law concerning dominion is merely the subject-matter of the other preceptive law, and consists (so to speak) of a certain fact, that is, a certain condition or habitual relation of things.—*Ibid.,* § 19.

Since the law of nature arises out of Divine Providence, it is immutable; but a part of this natural law is the primary or primitive law of nations, differing from the secondary or positive law of nations, which is mutable.—Grotius, *Mare liberum,* chap. vii.

Scope and Purpose of Natural Law

Natural law is that which nature teaches to all animals, for this law is not peculiar to the human race, but affects all creatures which deduce their origin from the sea or the land, and it is also common to birds. From it proceeds the union of male and female which we designate as marriage; hence also arises the procreation of children and the bringing up of the same; for we see that all animals, and even wild beasts, appear to be acquainted with this law.—*Digest* I. i. 1, § 3 (Ulpian's famous definition).

To come to the law of nature . . . thereby we sometimes mean that manner of working which God hath set for each created thing to keep; yet forasmuch as those things are termed most properly natural agents, which keep the law of their kind unwittingly, as the heavens and elements of the world, which can do no otherwise than they do; and forasmuch as we give unto intellectual natures the name of *voluntary* agents, that so we may distinguish them from the other; expedient it will be, that we sever the law of nature observed by the one from that which the other is tied unto. Touching the former, their strict keeping of one tenure, statute, and law, is spoken of by all, but hath in it more than men have as yet attained to know, or perhaps ever shall attain, seeing the travail of wading herein is given of God to the sons of men, that perceiving how much the least thing in the world hath in it more than the wisest are able to reach unto, they

may by this means learn humility.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. iii. 2.

Not even brute animals are capable of [participating in] law in a strict sense, since they have the use neither of reason nor of liberty; so that it is only by a like metaphor that natural law may be ascribed to them.—Suárez, *De legibus,* Book I, chap. iii, § 8.

The commands relating to the restitution of the property of another, the return of a deposit, the observance of good faith, speaking the truth, and similar matters; all of these . . . [are] peculiar to mankind and not common even in a material fashion to the brutes, while they nevertheless pertain most decidedly to the province of the natural law.—*Ibid.,* Book II, chap. xvii, § 6.

[It is improper to say] that the natural law has been laid down for the brutes in common with men.—*Ibid.,* § 7.

The natural law is the common law of all the nations, in that it is everywhere observed by natural instinct, and not by any ordinance: and such are the union of male with female, the procreation and rearing of children, the possession in common of all things and the common liberty of all; the acquisition of those things which are taken from the heavens or the earth or the sea; in like manner the restoring of property or money given over in trust, and repelling of violence by force. For this (or whatever is like this) is never held unjust, but natural and equal.—Isidore, *Etymologies,* Book V, chap. iv.

The law of reason teacheth, that good is to be loved, and evil is to be fled: also that thou shalt do to another, that thou wouldest another should do unto thee; and that we may do nothing against truth; and that a man must live peacefully with others; that justice is to be done to every man; and also that wrong is not to be done to any man; and that also a trespasser is worthy to be punished; and such other. Of the which follow divers other secondary commandments, the which be as necessary conclusions derived of the first. As of that commandment, that good is to be beloved; it followeth, that a man should love his benefactor.

. . . And this law also suffereth many things to be done: as that it is lawful to put away force with force; and that it is lawful for every man to defend himself and his goods against an unlawful power. And this law runneth with every man's law, and also with the law of God, as to the

deeds of man, and must be always kept and observed, and shall always declare what ought to follow upon the general rules of the law of man, and shall restrain them if they be any thing contrary unto it.—St. Germain, *Doctor and Student* (16th ed.), pp. 6–7.

Just as the natural law commands the fulfilment of what has been promised of one's own will, so also does it command the performance of that which has been enjoined by the will of a superior.—Suárez, *De legibus*, Book II, chap. ix, § 9.

Man is (as it were) an individual entity and as such has an inclination to preserve his own being, and to safeguard his own welfare; he is also a being corruptible—that is to say, mortal—and as such is inclined towards the preservation of the species, and towards the actions necessary to that end; and finally, he is a rational being and as such is suited for immortality, for spiritual perfection, and for communication with God and social intercourse with rational creatures. Hence, the natural law brings man to perfection, with regard to every one of his tendencies and, in this capacity, it contains various precepts.—*Ibid.*, chap. viii, § 4.

The reproval of a brother by fraternal correction, and the instruction of the ignorant, especially regarding those things which relate to good conduct, are [acts] by prescribed natural law.—Suárez, *De mediis*, sec. I, no. 1.

[Natural] law prescribes certain good actions and prohibits evil ones, but . . . permission and punishment, properly speaking, have no place therein. . . . True permission has no place in this law, since it permits nothing which is evil in itself to be done licitly, a self-evident fact, inasmuch as the law in question is opposed to actions that are intrinsically and *per se* evil.—Suárez, *De legibus*, Book II, chap. xii, § 1.

When an act is forbidden by the natural law because of some defect of power, or because of the incapacity of the subject-matter, then, the act is null and void, by its very nature.—*Ibid.*, § 4.

When an act is forbidden on account of some unseemliness or turpitude discerned in its subject-matter, then it is also invalid when that same turpitude persists in the effect itself [of the act], or, as the jurists say, when the turpitude has a continuous cause.—*Ibid.*, § 5.

There are many precepts of the natural law which are not binding, and which have no application save in conjunction with an assumption of some

kind. For example, the prohibition against stealing has no application unless there has been a division of property and of property rights. . . . also the precept requiring justice in contracts, unless one assumes the existence of commercial intercourse among men.—*Ibid.*, chap. xvii, § 9.

It belongs to the notion of human law, to be derived from the law of nature. . . . In this respect positive law is divided into the *law of nations* and *civil law*, according to the two ways in which something may be derived from the law of nature. . . . Because, to the law of nations belong those things which are derived from the law of nature, as conclusions from premises.—St. Thomas Aquinas, I.–II, qu. 95, art. 4.

In truth, it is altogether absurd to suppose that anything expedient to the administration of human affairs is contrary to natural or divine law. . . . nothing . . . is prohibited by the Gospels if it be permitted by natural law; indeed, evangelical liberty consists principally in this very fact.—Vitoria, *De potestate civili*, no. 8.

[Natural] law prescribes that which is in harmony with rational nature as such, and prohibits the contrary.—Suárez, *De legibus*, Book II, chap. vii, § 1.

Natural law, then, in the proper sense of the term—the natural law which pertains to moral doctrine and to theology—is that form of law which dwells within the human mind, in order that the righteous may be distinguished from the evil.—*Ibid.*, Book I, chap. iii, § 9.

The subject-matter of natural law consists in the good which is essentially righteous, or necessary to righteousness, and the evil which is opposed to that good, in the one, as something to be prescribed; in the other, as something to be forbidden.—*Ibid.*, Book II, chap. vii, § 1.

A natural precept does not cause, but [merely] points out the wickedness of the action prohibited.—*Ibid.*, chap. xv, § 29.

Not only does the natural law indicate what is good or evil, but furthermore, it contains its own prohibition of evil and command of good.—*Ibid.*, chap. vi, § 5.

The natural law . . . truly and properly forbids anything in human actions which is in itself evil or inordinate.—*Ibid.*, § 19.

The natural law differs from other laws in this very respect, namely, that the latter render evil what they prohibit, while they render necessary,

or righteous, what they prescribe; whereas the natural law assumes the existence in a given act or object, of the rectitude which it prescribes, or the depravity which it prohibits. Accordingly, it is usual to say that this law forbids a thing because that thing is evil, or prescribes a thing because it is good.—Suárez, *De legibus,* Book II, chap. vii, § 1.

Whenever a particular natural precept is fulfilled by means of an evil act, the law of nature itself is violated.—*Ibid.,* chap. x, § 13.

It should be noted that there are many ways in which a thing may be spoken of as pertaining to the natural law. In the first and most fitting sense, it may be spoken of thus when some natural precept prescribes the thing in question; and this is the sense proper to the natural law, with which we are dealing. For such a situation, it is necessary that natural reason, viewed in its essential character, shall dictate that something is necessary to right conduct; whether it so dictates without reflection or as the result of a single act of reflection, or of several such acts. . . .

According to another manner of speaking, however, a thing is said to pertain to the natural law merely in a permissive, negative, or concessive sense, to put the matter thus. Under this classification many things fall which, from the standpoint simply of natural law, are permissible, or conceded, to men—such things as the holding of goods in common, human liberty, and the like. With respect to these things, the natural law lays down no precept enjoining that they shall remain in that state; rather does it leave the matter to the management of men, such management to be in accord with the demands of reason. Thus it can be said that nakedness is natural to man, and that this nakedness would not require covering in the state of innocence; whereas, in the condition of fallen [human] nature, natural reason imposes a different requirement. So also liberty is natural to man, since he possesses it by virtue of natural law; yet the law of nature does not forbid the loss of his liberty.

In yet another sense, a thing may be spoken of as pertaining to the natural law, for the reason that it has its foundation in a natural disposition, although it is not absolutely prescribed by natural law.—*Ibid.,* chap. xiv, § 6.

There are two senses in which a matter may fall under the natural law; namely, a negative, and a positive sense. It is said that [a given action] falls negatively under the natural law because that law does not prohibit, but on the contrary permits [the said action], while not positively prescribing its performance. When, however, something is prescribed by natural

law, that prescription is said to be positively a part of natural law; and when any thing is prohibited thereby, the thing thus prohibited is said to be positively opposed to natural law.—*Ibid.*, § 14.

Natural law . . . prescribes that it is in the interest of justice that no one's increase in wealth should involve loss and injury to another.—Gentili, *De legationibus,* Book II, chap. xvi.

By natural law revenge for wrongs is allowed, although it is not permitted by the civil law.—Gentili, *De jure belli,* Book I, chap. xviii.

Human Knowledge of Natural Law

For who wrote the natural law in the hearts of men except God? On this law the Apostle said (Rom. 2: 14, 15, 16): "For when the Gentiles, who have not the law, do by nature those things that are of the law; these having not the law are a law to themselves:

"Who shew the work of the law written in their hearts, their conscience bearing witness to them, and their thoughts between themselves accusing, or also defending one another,

"In the day when the Lord shall judge the secrets of men."—St. Augustine, *On the Sermon of the Lord on the Mount,* II. ix.

There is no soul, "in whose conscience God does not speak. For who save God writes the natural law in the hearts of men?"—Suárez, *De legibus,* Book I, chap. iii, § 9, quoting St. Augustine.

Just as the natural law is said by Paul (Romans, Chap. ii, v. 15) to be written in the heart, so it can and should also be read there by the mind.—*Ibid.*, chap. i, § 9.

Natural law . . . is looked upon as existing not in the Lawgiver, but in men, in whose hearts that Lawgiver Himself has written it, as Paul says, and that, by means of the illumination of the mind, as is intimated in *Psalms,* iv.—*Ibid.*, Book II, chap. v, § 14.

The natural law is promulgated by the very fact that God instilled it into man's mind so as to be known by him naturally.—St. Thomas Aquinas, I.–II, qu. 90, art. 4, ad 1.

The natural law, as to general principles, is the same for all, both as to rectitude and as to knowledge. But as to certain matters of detail, which are conclusions, as it were, of those general principles, it is the same for

all in the majority of cases, both as to rectitude and as to knowledge; and yet in some few cases it may fail, both as to rectitude, by reason of certain obstacles (just as natures subject to generation and corruption fail in some few cases on account of some obstacle), and as to knowledge, since in some the reason is perverted by passion, or evil habit, or an evil disposition of nature.—St. Thomas, I.–II, qu. 94, art. 4.

My desire . . . to be loved of my equals in nature as much as possible may be, imposeth upon me a natural duty of bearing to them-ward fully the like affection. From which relation of equality between ourselves and them that are as ourselves, what several rules and canons natural reason hath drawn for direction of life no man is ignorant; as namely, *That because we would take no harm, we must therefore do none; That sith we would not be in any thing extremely dealt with, we must ourselves avoid all extremity in our dealings; That from all violence and wrong we are utterly to abstain;* with such like.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. viii. 7.

A law is properly that which reason in such sort defineth to be good that it must be done. And the law of reason or human nature is that which men by discourse of natural reason have rightly found out themselves to be all for ever bound unto in their actions.—*Ibid.,* 8.

Laws of reason . . . are investigable by reason, without the help of revelation supernatural and divine. . . . In such sort they are investigable, that the knowledge of them is general, the world hath always been acquainted with them; according to that which one in Sophocles observeth concerning a branch of this law: "It is no child of to-day's or yesterday's birth, but hath been no man knoweth how long sithence" [*Antigone,*[14] line 456]. It is not agreed upon by one, or two, or few, but by all: which we may not so understand, as if every particular man in the whole world did know and confess whatsoever the law of reason doth contain; but this law is such that being proposed no man can reject it as being unreasonable and unjust. Again, there is nothing in it but any man (having natural perfection of wit and ripeness of judgment) may by labour and travail find out. And to conclude, the general principles thereof are such, as it is not easy to find men ignorant of them. Law rational therefore, which men commonly use to call the law of nature, meaning thereby the law which human nature knoweth itself in reason universally bound unto, which also for that cause

[14] See *supra,* under the rubric "Immutability of Natural Law."

may be termed most fitly the law of reason; this law, I say, comprehendeth all those things which men by the light of their natural understanding evidently know, or at leastwise may know, to be beseeming or unbeseeming, virtuous or vicious, good or evil for them to do.—*Ibid.*, 8–9.

The natural law is made known to men in a twofold way; first, through the natural light of reason, and secondly, through the law of the Decalogue written on the Mosaic tablets.—Suárez, *De legibus,* Book II, Introduction.

In so far . . . as regards the primary and most universal principles—no one can be ignorant of this law, inasmuch as those principles are by the very terms defining them completely known and to such a degree in harmony with and (as it were) fitted to the natural bent of the reason and will, that it is not possible to evade them.—*Ibid.*, chap. viii, § 6.

Thus it is that St. Thomas . . . has said that the natural law, at least in so far as such principles are concerned, cannot be eradicated from the hearts of men. And it is in the same sense, that some writers interpret Aristotle (*Nicomachean Ethics,* Book III, chap. i, § 15), when the latter says that any person may well be censured if he is ignorant of universal [principles]. —*Ibid.*

It is not possible that one should in any way be ignorant of the primary principles of the natural law, much less invincibly ignorant of them; one may, however, be ignorant of the particular precepts, whether of those which are self-evident, or of those which are deduced with great ease from the self-evident precepts.—*Ibid.*, § 7.

Although all the precepts of the natural law may be immutable, yet not all are equally manifest; so that it is not incongruous that some of them should fail to be known.—*Ibid.*, chap. xiii, § 10.

Natural Law as a Standard for Human Law

The theologians, and . . . Cicero[15] and . . . the philosophers as well . . . speak clearly of a law which is the rule of human acts and the pattern of all other laws existing in the minds of men, or capable of emanating therefrom. . .

The essential principle of a standard or foundation for rectitude does not suffice as the equivalent of the essential principle of law; and conse-

[15] See *De re publica* III. xxii. 33; and *De legibus* I. vi. 18–19; II. v. 13.

quently, . . . rational nature merely as such, may not fittingly be called natural law. . . .

With regard to the first aspect, rational nature is said to be the basis of natural rectitude; but with regard to the second, it is said to be the very precept [*lex*] of nature which lays commands or prohibitions upon the human will regarding what must be done [or left undone], as a matter of natural law [*ius*]. This appears to be the opinion of the theologians and the jurists. . . . The philosophers, too, frequently speak in this vein.—Suárez, *De legibus*, Book II, chap. i, § 7; chap. v, § § 8, 9.

A human lawgiver ought to conduct himself in his legislative acts as a disciple of natural law (so to speak), and ought to prescribe those things which are in harmony with its teaching.—*Ibid.*, Book I, chap. ix, § 10.

The first ground of the law of *England* is the *law of reason*.—St. Germain, *Doctor and Student* (16th ed.), p. 13.

Obligations Imposed by Natural Law

Amongst creatures in this world, only man's observation of the law of his nature is *Righteousness*, only man's transgression *Sin*. And the reason of this is the difference in his manner of observing or transgressing the law of his nature. He doth not otherwise than voluntarily the one or the other. —Hooker, *Of the Laws of Ecclesiastical Polity*, I. ix. 1.

Nature itself teacheth laws and statutes to live by . . . The laws . . . mentioned do bind men absolutely even as they are men, although they have never any settled fellowship, never any solemn agreement amongst themselves what to do or not to do.—*Ibid.*, x. 1.

In every age independent and wise and devout men . . . showed that . . . He [God] had drawn up certain laws not graven on tablets of bronze or stone but written in the minds and on the hearts of every individual, where even the unwilling and the refractory must read them. That these laws were binding on great and small alike; that kings have no more power against them than have the common people against the decrees of the magistrates, than have the magistrates against the edicts of the governors, than have the governors against the ordinances of the kings themselves; nay more, that those very laws themselves of each and every nation and city flow from that Divine source, and from that source receive their sanctity and their majesty.—Grotius, *Mare liberum*, Introduction.

The law to which we appeal is one such as no king ought to deny to his subjects, and one no Christian ought to refuse to a non-Christian. For it is a law derived from nature, the common mother of us all, whose bounty falls on all, and whose sway extends over those who rule nations, and which is held most sacred by those who are most scrupulously just.—*Ibid.*

The binding force of the natural law constitutes a true obligation; and that obligation is a good in its own way, existing in point of fact; therefore, this same obligation must proceed from the divine will, which decrees that men shall be bound to obey that which right reason dictates.—Suárez, *De legibus,* Book II, chap. vi, § 10.

The natural law, as it exists in man, has the force of a divine mandate.—*Ibid.,* § 7.

Of the effects of [natural] law . . . the chief, or very nearly the sole effect, is its binding force, for if the natural law does have other effects, they too may be reduced to this one.—*Ibid.,* chap. ix, § 1.

The natural law, as it exists in man, does not merely indicate what is evil, but actually obliges us to avoid the same; and . . . it consequently does not merely point out the natural disharmony of a particular act or object, with rational nature, but is also a manifestation of the divine will prohibiting that act or object.—*Ibid.,* chap. vi, § 13.

The affirmative precepts of the natural law are of binding force only for those occasions upon which the failure to perform the act prescribed would be of itself and intrinsically evil; accordingly, just as that omission cannot fail to be evil, so, in like manner, the obligation imposed by an affirmative precept, and compelling the performance of the action opposed to the omission, cannot of itself lapse or undergo change; and, therefore, such a precept is necessarily always binding with respect to the time to which it refers, and consequently always imposes also a binding obligation not to entertain the contrary purpose, or an obligation to obedience, at least, in the preparation of the spirit.—*Ibid.,* chap. xiii, § 4.

The negative precepts prohibit things which are in themselves and intrinsically wrong; and, therefore, they are binding for all time, and continuously, both by reason of their form, since negation destroys everything, and by reason of the fact that what is in itself evil should always and everywhere be avoided; hence, according to the same reasoning, these pre-

cepts cannot of themselves cease to exist, inasmuch as a thing which is in itself evil cannot cease to be evil.—Suárez, *De legibus,* Book II, chap. xiii, § 4.

God does not, properly speaking, grant dispensations with respect to any natural precept; but . . . He does change the subject-matter of such precepts or their circumstances, apart from which they themselves do not possess binding force.—*Ibid.,* chap. xv, § 26.

Whenever any natural precept seems not to be binding upon some particular occasion, it must be that there is some change in the subject-matter of the act involved, the subject-matter whence the act derived that evil character which causes it to be prohibited by the natural law—*Ibid.,* chap. xvi, § 12.

If a precept is natural, then, in so far as it possesses this characteristic, it follows as a necessary consequence from natural principles; and therefore, dispensations are no more possible in the case of these precepts than in the case of the principles themselves.—*Ibid.,* chap. xv, § 29.

In addition to [its intrinsic obligation], the law imposes a special moral obligation, which we speak of as an effect of that law. It is customarily called by the jurists a natural obligation; not because it is not moral, but in order to distinguish it from civil obligations. Wherefore, these same persons also admit that it is an obligation binding in conscience, and so term it. . . . [As] a natural obligation, it certainly cannot be separated from an obligation in conscience, since, if that natural obligation consists in [a duty] to avoid something, it must spring from the intrinsic evil of the action [prohibited], which, for that reason, is to be avoided, as a matter of conscience; and if, on the other hand, the natural obligation consists in [a duty] to do something, then it springs from the intrinsic connexion between the required action and that which is good from the standpoint of moral virtue, which we are bound in conscience also to observe in our actions.—*Ibid.,* chap. ix, §§ 4, 6.

The natural principles in accordance with which a man ought to be governed in moral matters, are so general in character, as virtually to include every obligation; and consequently, no obligation can be made applicable to man save through the mediation of those principles; therefore, just as all human knowledge is an effect of first principles, even so, every obligation in conscience is an effect of the natural law, in so far, at least, as it comprehends those first principles.—*Ibid.,* chap. ix, § 10.

There is no obligation in conscience which is not in some way an effect of the natural law—mediately and remotely, at least.—*Ibid.*, § 12.

An obligation in conscience arising from human law, is indeed an effect of the natural law.—*Ibid.*, § 9.

Not only the obligation resulting from human law, but also that resulting from divine and supernatural law, would seem to be an effect of the law of nature.—*Ibid.*, § 10.

With respect to a human law and the obligation proceeding therefrom, the natural law may be spoken of as a cause *per se*, since, in truth, every such obligation is *per se* founded upon principles of the natural law, known through the natural light [of reason].—*Ibid.*, § 12.

[When] human law . . . has the effect of imposing a simple obligation to perform, or to refrain from performing, a given act . . . the obligation in question is derived from human law, strictly speaking and in an immediate sense, but remotely, it is derived from the natural law.—*Ibid.*

In this sense, the obligation imposed by that civil law is said to be an effect of the natural law considered as a cause *per se*, not proximate but universal (so to speak) and modified by a specific [agency], which is human law.—*Ibid.*

One may demonstrate that the concession, as well as the prohibition laid in consequence upon other parties, pertains to natural law; or, if either one of them is absolutely a part of human law, it will be the concession rather than [the prohibition], and [yet], once the concession has been granted, the obligation resulting therefrom will be natural.—*Ibid.*, chap. xviii, § 7.

Though a change may be effected in the subject-matter through human law, or through the *ius gentium*, or even through the will of a private individual, . . . it is of no importance whether that change be made owing to one cause or owing to another; for once it has taken place, the natural law forthwith imposes a binding obligation to the same effect.—*Ibid.*, chap. ix, § 12.

The natural law is founded in reason, and immediately directs and governs the will; consequently, the binding force of the natural law is imposed *per se* (so to speak) and primarily upon the will; therefore, this law is observed only by the mediation of the will; hence, the mode of voluntary action is *per se* a matter of precept, and a requisite for the observance of

the law in question. . . . an unwilling disposition, then, is especially contrary to the natural law, which applies directly even to internal acts; and therefore, conversely, the mode of voluntary action is necessarily included in that which is prescribed by this law.—Suárez, *De legibus,* Book II, chap. x, § 4.

After positive law has laid down . . . a condition for the validity of a contract, natural law does not conflict with this positive rule, but rather, in its own fashion, binds one to the observance of the latter.—*Ibid.,* chap. xiv, § 19.

Law, which is based on natural reason, both teaches that justice should be rendered to everybody—it applies, too, to different categories—and holds everywhere. Every prince or judge is bound to render justice to anyone who asks it, since this is the office of justice, an office which clearly comes from the natural law which is in force everywhere.—Gentili, *Hispanicae advocationis,* Book I, chap. xiii.

Interpretation of Natural Law

The precepts of the natural law are certain necessary propositions that follow, by an inevitable process of deduction, from natural principles; and propositions of this kind cannot fail or be false in any individual case; therefore, it cannot, through any act of interpretation, become permissible to do that which is forbidden by the said precepts (since what they forbid is intrinsically wicked), or to leave undone what is prescribed by them (since what they prescribe is *per se* essential to rectitude).—Suárez, *De legibus,* Book II, chap. xvi, § 3.

Many natural precepts require a great deal of exposition and interpretation in order that their true sense may be established. This assertion may be understood to refer both to the natural law as it is in itself and to the same law as it is written in one that is positive.—*Ibid.,* § 6.

Not all natural precepts are equally well known or equally easy to understand, and they require interpretation in order that their true sense may be understood without any diminution or addition.—*Ibid.*

It may be stated by way of elucidation that human actions, in so far as concerns their rectitude or wickedness, depend to a great extent upon the circumstances and opportunities for their execution, and that in this respect there is great variety among them; for some are of a more unmixed char-

acter (so to speak) than others, and require fewer conditions in order to bring out their good or bad character. The natural law, moreover, does not in itself prescribe any act save in so far as it assumes that act to be good, nor does it prohibit any save in so far as it assumes that the act is intrinsically evil. Therefore, in order to understand the true sense of a natural precept, we must inquire into the conditions and circumstances under which the act concerned is essentially good or evil; and this inquiry is spoken of as the interpretation of a natural precept with respect to the true sense of that precept.—*Ibid.*

One example is drawn from the law concerning the return of a deposit, an example of which Cajetan makes use; for in the case of this precept, our interpretation is that the said precept is not binding when the return of the deposit would be contrary to justice or to charity. But this interpretation is not *epieikeia* relating to the natural precept itself, viewed according to its inherent nature; for the precept in question, as such, is embodied in right reason, and right reason lays down, not an absolute dictate that deposits must be returned, but a dictate that they shall be returned only under certain implied conditions required by the principles of justice and charity. Accordingly, the interpretation in this case is not made with respect to the universal character [of the precept] (as Cajetan asserts), but is rather a declaration of the true universality of the law itself, in so far as its inherent nature is concerned, that is to say, in so far as the said law is contained in right reason. Such interpretation, then, is not *epieikeia*.—*Ibid.*, § 7.

Custom

Mankind is ruled in two ways, to wit: by natural law and by customs.—Gratian, *Decretum*, Part I, dist. i.

Custom Defined

Unwritten customs, and what are termed the laws of our ancestors are all of similar nature. . . . We can neither call these things laws, nor yet leave them unmentioned, . . . for they are the bonds of the whole state, and come in between the written laws which are or are hereafter to be laid down; they are just ancestral customs of great antiquity, which, if they are rightly ordered and made habitual, shield and preserve the previously existing written law; but if they depart from right and fall into disorder, then they are like the props of builders which slip away out of their place and cause a universal ruin—one part drags another down, and the fair super-

structure falls because the old foundations are undermined.—Plato, *Laws*, VII, p. 793.

Mos is custom approved by its antiquity, or unwritten *lex*.—Isidore, *Etymologies*, Book V, chap. iii.

Custom is the tacit consent of the people confirmed by long-established practice.—*Fragments of the Rules of Domitius Ulpianus*, no. 4.

Custom resides not in single acts, but in the frequency of them.—Suárez, *De legibus*, Book VII, chap. i, § 4.

By custom is meant either (1) the law which was easily drawn from nature, and which usage nourished and made greater, like religion; . . . or (2) it is that which antiquity, with the approval of the people, has prolonged into usage.—St. Augustine, *On Eighty-Three Different Questions*, XXXI. 1.

In custom, two elements are to be found: the factual and the juridical.—Suárez, *De legibus*, Book VII, chap. i, § 7.

We must distinguish two elements in custom. The one is the frequency of actions, as such, which we may call formal custom. This . . . is matter of fact—as usage is. The other is an after-effect of the repeated acts. This after-effect may be physical, as habit. . . . A second after-effect can be one of the moral order, after the manner of a power or a law binding to such action, or nullifying another obligation. This may be called consuetudinary law or a legal rule introduced by custom.—*Ibid.*, § 4.

[That] customary action establishes a moral power or obligation, or, as we shall see later, changes established obligations, by creating not a physical but a moral power or bond which we call law. Thus, just as the word *mos* from meaning a repetition of free actions, has come to signify the habit or inclination itself, so custom, even though its primary reference is to actions as such, has been capable of being transferred to mean a juridical element, which is the result of the repetition of actions, by which it brings into being [now as law, not as physical habit] the repetition of like actions.—*Ibid.*

[The] custom of fact [which] is capable of introducing law . . . is a legitimate repetition of actions in consonance with some law; or, . . . one in which all the conditions required by the law are fulfilled.—*Ibid.*, § 5.

We may apply the word custom either to the frequency of action or to the legal rule created by it.—*Ibid.*, § 4.

Custom is most properly pronounced to be unwritten law. . . . The reason is that it does not of its nature demand a written instrument, nor does it flow from written law; nor even from the personal or express precept of the superior: it is introduced by usage, for this is embodied not in writing nor in words, but in facts.—*Ibid.*, chap. ii, § 2.

Strictly speaking, tradition and custom are different things. Tradition relating to general conduct . . . is evidently the first institution of some action or of a mode of acting; or it may be understood as meaning a body of doctrine through which such an institution is given or made known to men. Custom, on the other hand, which embodies the tradition, is the fulfilment, and (as it were) the preservation of the original tradition. Hence, tradition may be written or unwritten, but custom exists as usage, and so is unwritten. —*Ibid.*, chap. iv, § 10.

To the extent that . . . non-usage is frequent and continuous, it possesses the character of a custom.—*Ibid.*, chap. v, § 14.

Introduction of Custom

Who is capable of introducing custom? In the first place, all maintain than a private person is not adequate therefor; but that a perfect community is required.—*Ibid.*, chap. ix, § 3.

A legal custom can be introduced not by any community whatever, but only by one possessing the capacity for legislative authority over itself; or, at least, by a community of sufficient perfection to be the subject of law properly so-called.—*Ibid.*, § 6.

Custom does not require for its establishment . . . a judicial act, either by reason of its nature or from the obligation of positive law.—*Ibid.*, chap. xi, § 2.

In order that a custom be extended to other peoples, it is necessary that they adopt and copy it; and thus, this imitation will effect among them the introduction of a like custom and promulgation.—*Ibid.*, chap. xvi, § 1.

A custom forbidding certain actions or giving [legal] form thereto, can be introduced with the intention and will that acts done otherwise shall not be valid, and . . . such a custom, if it be reasonable and be secured by prescription or have the express or tacit approval of the prince, shall have the effect of voiding such a contrary act.—*Ibid.*, § 4.

The consent of the prince must first of all be recognized as necessary for the introduction of a custom.—Suárez, *De legibus,* Book VII, chap. xiii, § 1.

The people among whom a custom is introduced may be of two conditions.

If they are free, and able to make their own laws, the consent of the whole people expressed by a custom counts far more in favour of a particular observance, than does the authority of the sovereign, who has not the power to frame laws, except as representing the people. Wherefore although each individual cannot make laws, yet the whole people can.

If however the people have not the free power to make their own laws, or to abolish a law made by a higher authority; nevertheless with such a people a prevailing custom obtains force of law, in so far as it is tolerated by those to whom it belongs to make laws for that people: because by the very fact that they tolerate it they seem to approve of that which is introduced by custom.—St. Thomas Aquinas, I.–II, qu. 97, art. 3, ad 3.

A legitimate custom proceeds either from a free people, and hence from one having supreme power, and, therefore, the power of enacting law; or from one having a pastor or prince by whom it is governed. In this latter case, if a legitimate custom is thought of—as it should be—as proceeding not from a people regarded apart from its sovereign, but from the people jointly with its head, and displaying in some sufficient way his influence, either by his having given the people the power to make its own municipal laws or statutes, or by his approval of the custom, an approval given either by law itself, or by his proved tacit will, then in a people thus conjoined with its head there resides sufficient power to make laws, as is evident.—Suárez, *De legibus,* Book VII, chap. xiv, § 4.

In free peoples, it is to be supposed that the greater number of the people and the magistracy concur voluntarily in a custom. In other communities, the consent of the prince . . . is added to the will of the people or to that of the greater number.—*Ibid.,* § 5.

A custom is not introduced except by a repetition of public and voluntary acts, and for the reason that the consent of the people is necessary for the establishment of a custom.—*Ibid.,* chap. x, § 1.

Private Custom

Particular, private custom is that which is followed by one person only, or by an imperfect community, a community whose consent is not sufficient to institute law.—*Ibid.,* chap. iii, § 8.

It is not . . . possible for an individual subject to exempt himself from a law by means of his own evil custom.—*Ibid.*, chap. ix, § 5.

A private custom of violating even a positive statute never excuses the fault; on the contrary, it normally rather increases it.—*Ibid.*

Scope and Limitations of Custom

Unwritten law is made up of customs, and if it has been introduced by the custom of one particular nation and is binding upon the conduct of that nation only, it is also called civil; if, on the other hand, it has been introduced by the customs of all nations and thus is binding upon all, we believe it to be the *ius gentium* properly so-called.—*Ibid.*, Book II, chap. xix, § 6.

By actions . . ., especially if they be repeated, so as to make a custom, law can be changed and expounded; and also something can be established which obtains force of law, in so far as by repeated external actions, the inward movement of the will, and concepts of reason are most effectually declared; for when a thing is done again and again, it seems to proceed from a deliberate judgment of reason. Accordingly, custom has the force of a law, abolishes law, and is the interpreter of law.—St. Thomas Aquinas, I.–II, qu. 97, art. 3.

No custom can prevail over the Divine or natural laws.—*Ibid.*, ad 1.

Relation of Custom to Natural Law

We may say that a particular custom is in accord with the natural law, since it proceeds from it, and through it the natural law itself is observed. A custom of an entirely opposite character will be contrary to law, since by it the law is violated—if no more than slightly. . . .

Custom will be outside the natural law when it consists of actions that are, according to a probable opinion, indifferent in the concrete; or of good actions, which, although they are approved by the natural law or enjoined by it as to mode or precise character—that is, if they are done, they should be done in this or that way,—are not absolutely enjoined as to performance: they are performed without the command of the natural law . . . Such a custom may at times—if it be approved by prudent, wise, and virtuous men—serve to interpret the law of nature—Suárez, *De legibus*, Book VII, chap. iv, §§ 3, 4.

Custom . . . according to the natural law . . . does not introduce new positive law in respect of the same acts, since those acts are done not with

such intention or will [of introducing custom]; but rather with the intention of fulfilling the natural law.—Suárez, *De legibus*, Book VII, chap. iv, § 4.

A custom contrary to the law of nature is not worthy of the name of custom; it rather merits that given it in the language of the laws—a corruption.—*Ibid.*

The Law of Nations and Custom

The *ius gentium* is truly a kind of custom, and so has its force not solely in virtue of natural law.—*Ibid.*, chap. iii, § 7.

Customs of the whole world . . . constitute the *ius gentium*. . . . For that *ius gentium* is true law, and in its own order it binds as true [particular] law. . . . Furthermore, that *ius gentium* is unwritten, a fact that is also obvious. Therefore, it was introduced by the usage and general conduct, not of one or another people, but of the whole world. Hostiensis, therefore, calls it universal, that is, most common custom.—*Ibid.*

A custom contrary to the *ius gentium* can be approved and tolerated in the case of one people, in such fashion that it does not result in serious harm or prejudice to another people.—*Ibid.*, chap. iv, § 7.

It is not absolutely inconceivable that a part of the *ius gentium* should be abrogated by custom.—*Ibid.*, § 6.

While admitting the possible abrogation through custom of some portion of the *ius gentium*, nevertheless, it is morally impossible that the whole of this law could be abolished, since in that case all nations would have to concur in a custom contrary to the *ius gentium:* which is morally impossible. And this, both for the reason that such uniformity in any matter is hardly found, and especially for the reason that the *ius gentium* is in close harmony with nature. Whatever, then, is contrary thereto is of rare occurrence.—*Ibid.*, § 7.

Custom and Written Law

Even though men took up a life in common without laws before such were written . . . it is to be inferred that they held in the place of law, not custom, but rather the personal rule of the king, which is neither law nor custom.—*Ibid.*, Introduction.

It appears that custom is partly handed down in writing, and partly indeed, is preserved by the conduct (*moribus*) of those using it. Custom which is handed down in writing is called a regulation (*constitutio*), or a

law (*ius*); but that which is not handed down in writing is called by a general name, to wit: custom (*consuetudo*).—Gratian, *Decretum,* Part I, dist. i, can. v.

Now, between law (*lex*) and custom (*mores*) there is this difference, that law is written, whereas custom (*mos*) is usage (*consuetudo*) authorized by the stamp of long duration or, in other words, unwritten law. For the term "law" (*lex*) has been derived from the expression "to be read" (*legendum*), inasmuch as law has been written down. Custom [*i.e.,* the singular form, *mos*], on the other hand, is long standing usage, and has been similarly derived from the expression "habits of conduct" (*mores*). Usage, in turn, is a species of abstract law (*ius*), established by habits of conduct and accepted in the place of [formal] law (*lex*), when the latter is wanting; and it is immaterial whether [usage] rests upon writing or upon reason, since reason also is a contributing factor to law (*lex*). Furthermore, if law (*lex*) rests upon reason, it will embrace all that which has already been found to be in correspondence with reason, in so far as this is also in harmony with religious piety, acceptable from the standpoint of scientific learning, and advantageous to human welfare.—Isidore, *Etymologies,* Book II, chap. x, §§ 1–3.

In cases where there are no written laws, that should be observed which has been established by usage and custom.—*Digest* I. iii. 32.

Those rules which have been approved by long-established custom and have been observed for many years, by, as it were, a tacit agreement of citizens, are no less to be obeyed than laws which have been committed to writing.

And indeed, a law of this kind has greater authority, for the reason that it has been approved to such an extent that it is not necessary to commit it to writing.—*Ibid.,* 35, 36.

The written is the principal form of law, and . . . from it custom derives in great measure its force and meaning.—Suárez, *De legibus,* Book VII, Introduction.

If . . . custom be reduced to writing by one who has authority to establish law, it ceases to be custom by the very fact that it is so written: it is now written and not unwritten law, and is law not by tacit but by express consent.—*Ibid.,* chap. ii, § 3.

A custom binds only a people which makes use of it, and so there is no necessity for any other promulgation or publication. . . . If, however, one people adopt the custom of another people, not through a custom of its own creation, but through a statute directing the observance among them of a custom practised elsewhere, their law will then not be consuetudinary, but written law, and will, as such, require its own form and promulgation. —Suárez, *De legibus,* Book VII, chap. xvi, § 1.

Subject-Matter and Form of Custom

In the case of custom, there are not strictly any matter and form of which it is composed; but in so far as the custom is a juridical entity, the matter with which it deals is the same as that of written human law. For the written law and unwritten law differ not in the matter with which they deal, but only in the mode of expression employed in their institution. Whence, also, in consuetudinary law, there is no special form, sensible and external, except the actions [constituting the custom], which must be external and sensible, and these, in so far as they are tokens of consent, may be called the unwritten words by which this kind of law is engraved upon the memory of men. And consequently, no special promulgation is required in this form of law, because custom, through the usage itself, is its own public manifestation and promulgation.—*Ibid.,* chap. ix, § 1.

There is no difference between these laws [*i.e.,* written and consuetudinary], since, as I have said, their subject-matter should be morally good, adapted to the public weal, and finally, reasonable. And thus it is clear that reason is (as it were) the soul of both kinds of law, and that both are chiefly dependent upon the will of the prince who possesses the power of legislation; a power which is, in the case of each kind of law, the true efficient cause, as the will [of the prince] is (so to speak) the substantial form.—*Ibid.,* chap. xvi, § 1.

In law, strictly so called, the will of the legislator is given outward expression in some form of writing, or, at least in an express statement made by him; in consuetudinary law, however, neither a written nor an oral expression of that sort has place, rather it is manifested in the form of external acts.—*Ibid.*

In the case of law [strictly so called] in addition to the enactment of the law by the legislator, its promulgation is required; for the enactment of the law is not in itself a public expression unless knowledge of it is spread

abroad. A custom, on the other hand, is itself an outward expression, of its very nature public, and known to the people observing it; and hence it does not need any other promulgation.—*Ibid.*

Voluntary Nature of Custom

Custom . . . is found only in free actions, since in necessary actions it is more correct to say that there never is any force of custom.—*Ibid.*, chap. i, § 4.

Not every . . . custom, even though it deals with mere facts, is sufficient to establish unwritten law. Only that custom which is concerned with free actions in so far as they are good or bad relatively to the common good, can do that. . . .

That the actions by which a custom is established must be voluntary is the certain and generally accepted doctrine on this point.—*Ibid.*, chap. iii, § 6; chap. xii, § 1.

A custom cannot be established by means of acts done in ignorance, or in error, since these are involuntary.—*Ibid.*, chap. xii, § 2.

It is of the essence of custom that it be established not by explicit but by tacit consent.—*Ibid.*, chap. ii, § 2.

One of the conditions requisite for consuetudinary law is that it be introduced by the tacit consent of the people, and such consent does not intervene, except by the usage and conduct of the people themselves.—*Ibid.*, chap. iii, § 8.

A custom does not prevail, nor is it established validly by acts done under compulsion or from grave or unjust fear. . . . Force and fear preclude the consent required for the introduction of custom.—*Ibid.*, chap. xii, § 10.

Custom as Creating Law

An ancient custom is not improperly observed as a law (and this is what is called law established by usage). For as the laws themselves restrain us for no other reason than because they are accepted by the judgment of the people . . . it is but proper that what the people have approved without being written should bind all persons—for what difference does it make whether the people have manifested their will by vote, or by acts and deeds?—*Digest* I. iii. 32.

It is usual for long-established custom to be observed as law in those matters which have not come down in writing.—*Digest* I. iii. 33.

The unwritten law is that which usage has confirmed, for customs long observed and sanctioned by the consent of those who employ them, resemble law.—*Institutes* I. ii. 9.

A custom adopted and observed steadfastly for a long period of time resembles a law and obtains the force of one.[16]—*Code* VIII. liii. 3.

The first effect . . . of legitimate custom, is to establish unwritten law where neither written nor traditional law exists.—Suárez, *De legibus,* Book VII, chap. xiv, § 2.

That which hath been received long sithence and is by custom now established, we keep as a law which we may not transgress.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. x. 8.

Not any conduct (*mos*) but only the general and public conduct of the community is sufficient for bringing in consuetudinary law.—Suárez, *De legibus,* Book VII, chap. i, § 8.

The public custom . . . of any community that has the capacity of being bound by its own laws, may establish law, in so far as it rests with the community.—*Ibid.,* chap. iii, § 10.

Consuetudinary law is commonly introduced in default of law: for where there is already written law, custom calculated to introduce law is not needed; the written law suffices.—*Ibid.,* chap. ii, § 2.

It is possible for a custom to establish a penal law.—*Ibid.,* chap. xvi, § 3.

[16] "It is a matter of legal history that, until the reign of Constantine, the long observance of a general custom, directly opposed to it, could annual a statute which had been enacted in perfect conformity with all the prescribed legislative requirements, a doctrine which placed written and unwritten laws upon the same footing, as emanating from the same source, the *vox populi. The Code of Justinian* (VIII. liii. 3) ascribes equal validity to the two, a rule, however, repeatedly contradicted in the *Digest,* by whose provisions the supremacy of statutory legislation is consistently maintained. The same principle is recognized in England. Scottish practice is at variance with this, as custom can abrogate a legislative enactment in that country, especially where a private right is involved. 'As one statute may be explained by another, so a statute may be explained by the uniform practice of the community, and even go into disuse by a posterior contrary custom.' (Erskine, *Principles of the Laws of Scotland,* I. i. 16.) Such was the force of long-continued usage that, at common law, an Act of Parliament was necessary to abolish it. 'No law or custome of England can be taken away, abrogated, or adnulled, but by authority of parliament.' (Coke, *Institutes,* II. ix, p. 96.)

"The immense Coutumier Général de France, consisting of four great folio volumes, much of whose contents is derived directly and indirectly from Roman sources, indicates the importance and extent of customary law in France during the existence of the French monarchy." —S. P. Scott, *The Civil Law,* XIV, 334 n.

Custom as Confirming and Interpreting Law

When inquiry is made as to the interpretation of a law, it must in the first place be ascertained what rule the State formerly made use of in cases of the same kind; for custom is the best interpreter of the laws.—*Digest* I. iii. 37.

Laws are instituted when they are promulgated; they are confirmed when they are approved by the customs of those using them. For just as, on the contrary, some laws are today abrogated by customs, so also the laws above mentioned are confirmed.—Gratian, *Decretum,* Part I, dist. iv, can. iii.

Usages (*mores*) of long duration (unless they are opposed to law) when they are approved by the consent of those using them, express the law.—*Ibid.,* dist. xii, can. vi, citing Justinian, *Constitutions* I. i. (also found in *Institutes* I. ii. § 9).

Even though this custom [in harmony with law] does not introduce law, it may have some effects on pre-existing law by preserving it, and its future effects. In this sense, it is said first of all, to confirm the law. . . .

Another effect of this custom is to interpret the law; indeed, it is called in the canon law . . . and in the civil law "an excellent interpreter of the law."—Suárez, *De legibus,* Book VII, chap. iv, § 16.

Only a custom which is in accordance with law can interpret it.—*Ibid.,* chap. xvii, § 1.

A custom can avail for the interpretation of law in two ways; in one way, as a sign or witness thereof, since, so used, a custom in regard to the observance of law testifies that the custom expresses the mind of the law-maker, and that it has been received as such, and in no other way, since laws are composed of customary usage, as Isidore says in the *Decretum* (Part I, dist. i, can. i). . . .

Custom can interpret law in another way—as a concurrent cause in the introduction and settling of such interpretation, and of the binding force of the law as thus interpreted.—*Ibid.,* §§ 2, 3.

Not only the custom which is concerned with the observance of a law itself after its enactment, but also that which existed prior to its enactment, may be of great assistance in understanding the meaning of that law.—*Ibid.,* § 2.

It is possible for a custom to interpret not only human law, but divine and natural law as well, as all the Doctors cited above teach. Nevertheless, with these latter kinds of law, the interpretation is effected in a different manner, since custom can interpret human law by restricting or enlarging its scope. . . . Custom interprets divine law, however, only by indicating the intention of the lawgiver; and so, for this interpretation to be certain, the custom must be one that is observed as a tradition of the Universal Church, or one that has had the approval of the Popes.—Suárez, *De legibus,* Book VII, chap. xvii, § 6.

Custom in Opposition to Law[17]

The rule has . . . been most justly adopted that law shall be abrogated not only by the vote of the legislator, but also through disuse by the silent consent of all.—*Digest* I. iii. 32, § 1.

Human laws fail in some cases: wherefore it is possible sometimes to act beside the law; namely, in a case where the law fails; yet the act will not be evil. And when such cases are multiplied, by reason of some change in man, then custom shows that the law is no longer useful: just as it might be declared by the verbal promulgation of a law to the contrary. If, however, the same reason remains, for which the law was useful hitherto, then it is not the custom that prevails against the law, but the law that overcomes the custom: unless perhaps the sole reason for the law seeming useless, be that it is not *possible according to the custom of the country,* which has been stated to be one of the conditions of law. For it is not easy to set aside the custom of a whole people.—St. Thomas Aquinas, I.–II, qu. 97, art. 3, ad 2.

Doctors hold that a law grounded upon a custom is the most surest law: but this thou must always understand therewith, that such a custom is neither contrary to the law of reason, nor the law of God.—St. Germain, *Doctor and Student* (16th ed.), pp. 25–26.

What is clearer than that custom is not valid when it is diametrically opposed to the law of nature or of nations? Indeed, custom is a sort of affirmative right, which cannot invalidate general or universal law.—Grotius, *Mare liberum,* chap. vii.

The rule is certain that human law, whether canonical or civil, can be abrogated by custom.—Suárez, *De legibus,* Book VII, chap. xviii, § 2.

[17] See also the following rubric, "Law in Opposition to Custom."

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The people do not lack the power to effect the abrogation of law, if the power is explained as it ought to be, and if their will is sufficiently made known by means of the custom itself.—*Ibid.*

It is not always necessary for this effect [of abrogation] that there be a true custom of fact, that is, a positive custom, one which results from a frequency of actions; a privative custom—which is called abeyance—is sufficient, one, that is, which arises from a repeated omission of an act; and one which, of itself, is sufficient against affirmative precepts; for the reason that the very repetition of an omission to act sufficiently indicates a will not to accept such a precept.—*Ibid.*, § 7.

A reason of less force is needed in the custom for producing this effect [*i.e.*, the abrogation of law], than is required for introducing a law.—*Ibid.*, § 9.

For the custom [abrogating law] to be reasonable, it is insufficient that it be not opposed to natural reason, or to divine law, or that it has not been reprobated by law; but it is necessary that the will to be without such law be justifiable on the part of the subjects for a good reason, such as also justifies the consent of the prince to the abrogation of the law.—*Ibid.*, § 10.

In the case of civil laws, the same time is required for the abrogation of law as for its introduction, namely, ten years.—*Ibid.*, § 11.

No custom can establish new law, unless it is itself validated by prescription, or has the approbation of the prince's consent; and consequently, no custom can abrogate a previous custom, unless it have the same consent of the prince. Therefore, a period of at least ten years is required for abrogation, if the prince has no knowledge of the custom; or a period to be fixed by the judgment of prudent men, if the prince has knowledge of the new custom.—*Ibid.*, chap. xx, § 20.

The true opinion and the general one is that a period of forty years is required for a custom to be held prescriptive against canon laws.—*Ibid.*, chap. xviii, § 12.

A prescription does not require in the person against whom the prescriptive right is acquired any advertence to the prescription. Furthermore, the nature of human law in a certain way demands this; for it should be adapted to human conduct. Therefore, it is highly expedient that when a people has persevered for a sufficiently long time with a stubborn purpose

in a course of conduct opposed to a law, the prince should not urge the law, but should rather cease from enforcing it. Hence, it is justly provided that a prescriptive custom repeals a law [in opposition thereto], irrespective of the knowledge or ignorance of the prince.—Suárez, *De legibus*, Book VII, chap. xviii, § 15.

In order that an act may be sufficient to interrupt a custom, on the one hand, it will be necessary that it be done by the whole community in which the custom has been followed—for the acts of a few private individuals do not obviate the consent of the community, and so they cannot interrupt a general custom; or on the other hand, it will certainly be sufficient if an act contrary to the custom be done with the public authority of the one holding the necessary power.—*Ibid.*, chap. viii, § 15.

Just as one law revoking another is not regarded in itself and generally speaking to be extended for the reason that it is held to be irksome and, in a certain sense, a burden—as is clear from the principle that the amendment of laws is to be avoided—so also a custom abrogating a law is held to be irksome and, in a certain sense, a departure from normal ways, and is for this reason restricted as to its legal bearing, and is not to be extended.—*Ibid.*, chap. xix, § 28.

Just as custom is able to introduce law, so it is also able to derogate from law, and this the more so, since the words and the matter of the law can scarcely be [always] so clear as not to leave some ambiguity and room for interpretation. This interpretation, therefore, custom can establish in both ways, namely, in a rigorous or in a gentle sense; but in order to do this efficaciously, it must, as has been said, possess the condition necessary for the introduction or abrogation of law.—*Ibid.*, chap. xvii, § 5.

A custom which is reasonable and of a sufficient antiquity lacks nothing for effecting a derogation from a law.—*Ibid.*, chap. xix, § 27.

A custom which derogates from a law does not suppose a law that regards the same object as the custom, but rather the contrary, namely, that what the law forbade the custom permits—or conversely.—*Ibid.*, chap. ii, § 5.

A non-prescriptive custom is at times sufficient to derogate from a law, provided the prince has knowledge of the custom, and provided the custom itself is of such a nature, and of such duration as practically to be an indication of his consent to its effect. . . .

. . . Human laws ought to be adapted to the general conduct of the people for whom they are made, and . . . therefore lawmakers ought, in this matter, to respect a reasonable custom of their subjects.—*Ibid.*, chap. xviii, § 21.

Since derogation can be effected through the laws, it can be effected through custom . . . although there is no abrogation. . . . The reason is that there is a parity between the force of law and that of custom. Therefore, when, for any reason, the various parts of the law are separable, derogation can be made from one portion, while the other is left unaffected. But the penalty of the law can be separated from the guilt incurred by its violation. Custom can, therefore, derogate from the law respecting the imposition of a penalty, and can leave the guilt incurred by its violation intact. The reason is that the penalty in question is not essentially annexed to the transgression, but proceeds from the will of the prince; and his will may be changed with respect to one part of his law, whilst unchanged with respect to another, as is self-evident, and as is proved by usage. And the prince is bound by the law, as to its directive force, even though he is not bound as to its penalty.—*Ibid.*, chap. xix, § 3.

Sometimes a law may be abolished in such a way that it merely ceases to exist; that is, in such a way that it is no longer binding. In this case the acts specified by it are not forbidden, nor, on the other hand, are actions contrary to it prescribed. Again, at times, a law is abolished by (as it were) a contrary disposition; that is, an action that the abolished law forbade is enjoined, or an action that was of obligation under the earlier law is forbidden. I hold that both kinds of derogation can be introduced by legitimate custom.—*Ibid.*, § 29.

Custom . . . can be understood as exempting from the penalty, or as diminishing it, in two ways: first, through the abrogation of the law or by some derogation therefrom, at least as to that part of it which deals with the penalty; and second, by reason of the circumstances of the customary actions, that is, because, by reason of the number of those offending against the law and of the frequency with which the law is violated, there comes into being a proper reason for the reduction or remission of the penalty, even if no derogation is made from the law itself.—*Ibid.*, § 6.

A custom which is unreasonable in its disregard of the penal section of a law cannot establish a legal immunity from that penalty by the abrogation of the law . . .

No custom can, therefore, in any wise, in so far as it is unreasonable, derogate from a law in respect of any part of that law to which it is contrary; for what is true of such custom in relation to a law as a whole, is true of it with respect to parts of a law. Therefore a custom, unreasonable in its non-execution of a penalty, or in its failure to impose the penalty which is fixed by law, can never derogate from the law in question, even in respect of the law as it imposes a penalty.—Suárez, *De legibus,* Book VII, chap. xix, § 7.

From a public custom made up of actions in violation of law, especially from such a custom when it is tolerated, there results some ignorance of the law whereby the offence comes to be regarded as less serious; or, if not ignorance of the law, such an insensitiveness to the unlawfulness of the act as to lessen the gravity of the fault and, consequently, the liability to punishment. . . .

The example of the violation of the law by great numbers of people presents a very strong temptation (as it were) drawing the transgressor on as by an object of vehement passion; and this fact must usually be accounted as a mitigating circumstance in individual violations of the law.—*Ibid.,* § 8.

If the guilt due to the breach of the law is removed through custom, the penalty which follows that guilt is removed also.—*Ibid.,* § 11.

A law may be annulled, and its contrary established at the same time, and by the same custom.—*Ibid.,* § 30.

Law in Opposition to Custom[18]

Usage is inferior to authority: law and reason overcome bad usage.—Gratian, *Decretum,* Part I, dist. xi, can. i, citing Isidore, *Sinonimis,* Book II, chap. xvi.

Human law at times abrogates custom; and . . . at times also it prohibits custom; and . . . at other times it condemns custom. . . . These three effective dispositions of law are distinct. . . . Even a fourth member might be added, namely, "an unqualified opposition to a custom." . . . This last, although it is in some respects distinct, seems rather to coincide with the third.—Suárez, *De legibus,* Book VII, chap. vii, § 2.

The law is understood to prohibit a custom, first, if it expressly forbids that any custom be permitted introduction contrary to that law; . . . Again,

[18] See also the preceding rubric, "Custom in Opposition to Law."

the law does so—as is probable—when it absolutely prohibits every contrary custom, even if that law does not expressly mention the future or the introduction of the custom. . . . Such a law would seem to have reference to all such custom, both that which is in existence and any that can be introduced.—*Ibid.*, § 5.

Condemnation of a custom can be understood as accomplished by the law in two ways: by a mere declaration of law, or by way of regulation as well. The former takes place only when a custom is either so clearly evil as to be contrary to natural or divine law; or when it is evidently useless, and harmful to or at variance with the general welfare. The latter way seems to be used when it is not immediately evident from natural or divine principles alone that the custom is unreasonable, and nevertheless for the sake of greater decorum, or for the good of religion, or for the rigour of discipline, the law provides that the custom in question is to be held as unreasonable. For unquestionably it is possible for human law, and especially for the canon law, to do this, since such a regulation by the law may be in the highest degree proper in the interest of good morals.—*Ibid.*, § 9.

A custom is revoked by a subsequent law in opposition to it, especially when the legislator has knowledge of the custom.—*Ibid.*, chap. xx, § 3.

In order . . . that a law may revoke a custom by its own force and without the aid of an express revoking clause, it is necessary that the two be in every way repugnant and opposed to each other. Further, the consent of the prince is essential, since through that the revocation is accomplished; and since, for his consent, knowledge of the custom is a prerequisite, he must be presumed to have such knowledge.—*Ibid.*, § 6.

That a custom is unreasonable is one thing, but that it is forbidden is quite another: a custom can be prohibited even when it is not unreasonable; and again, a mere prohibition taken by itself does not make a custom unreasonable.—*Ibid.*, chap. xix, § 22.

When . . . a law revokes a custom simply or without any further declaration, there is no presumption that the law condemns it as unreasonable. Just as, when a subsequent law revokes a prior one, it is not therefore to be presumed that it condemns the earlier one as bad or unreasonable.—*Ibid.*, chap. vii, § 3.

The prince is not presumed to will the enactment of law inharmonious with the customs of those whom it is to bind . . . And this reasoning holds

for any custom which is firmly rooted in observance, even though it has not yet been validated by prescription. This conclusion is further strengthened by the rule of law that a general enactment does not regard what is particular, which the legislator would probably not have wished to affect by his legislation had he been aware of it; and that the forcing of the people to change a custom contrary to the dispositions of a general law, especially a custom which the prince would have taken into very serious account in the framing of his law had he known of it, is attended by difficulties beyond the ordinary.—Suárez, *De legibus,* Book VII, chap. xx, § 11.

Binding Effect of Custom

Custom is, of its own virtue, binding in conscience, since it is true law.—*Ibid.,* chap. xvi, § 2.

It could, finally, be established by a custom that whoever did not observe it should be bound in conscience to make reparation, even though no punishment followed, and thus the true character of legal custom would be preserved. Such customs, however, rarely or never occur.—*Ibid.,* § 3.

Consuetudinary law can be binding under a penal sanction.—*Ibid.*

Just as a law is binding upon those subject to it, so also is custom; and just as a law is not in force outside the territory for which it was enacted, so neither is custom.—*Ibid.,* § 6.

A wider extension is not possible with a legal custom than with a law, since the force of a legal custom with respect to the obligation it establishes is not greater than that of written law—the peculiarities of both kinds of law having been taken into account.—*Ibid.,* § 15.

Tests Applied to Custom

The authority and observance of long-established custom should not be treated with contempt, but it should not prevail to the extent of overcoming either reason or law.—*Code* VIII. liii. 2.

The authority of custom and long-standing usage is not bad: but not for so long as a moment would it in itself prevail to overcome reason or the written law.—Gratian, *Decretum,* Part I, dist. xi, can. iv, citing Emperor Constantine the Great to Proculus, also found in *Code* VIII. liii. 2.

Custom ought not to obstruct reason. Custom (which, according to some writers "crept in") ought not so to stand in the way that truth may the

less prevail and conquer. For a custom without truth is an error of long duration: wherefore in knowledge we follow the truth, having quitted error, because according to Esdras, truth conquered, as it was written: "And the truth remains, and grew strong forever, and lives and holds possession world without end." [III Esd. 4: 38.]—Gratian, *Decretum,* Part I, dist. viii, can. viii, citing Cyprian, *Letters,* lxxiv, "To Pompey."

"Vainly indeed," Augustine says, "do those who are conquered by reason throw up custom to us as an objection, as if custom were greater than truth; or as if that which the Holy Ghost has revealed to us as superior ought not to be followed in spiritual matters." Clearly this contention of Augustine is true; because reason and truth ought to be preferred to custom. But if truth supports custom, nothing ought to be more firmly adhered to. —*Ibid.,* can. vii, citing Augustine, *De baptismo contra Donatistas,* Book IV, chap. v.

A custom opposed to natural law cannot inaugurate a legal rule.—Suárez, *De legibus,* Book II, chap. xiv, § 8.

The final cause of custom . . . is, with due proportion, the same as that of written law, namely, the public utility, or that factor of the custom which makes it morally good.—*Ibid.,* Book VII, chap. ix, § 1.

Not every sort of factual custom has the power of creating a legal rule. An evil custom, for instance, creates no legal force; nor does one that grows out of the observance of a law.—*Ibid.,* chap. i, § 5.

Legal custom cannot be of an evil character, or opposed to rectitude, since this very evil would be in contradiction with the nature of law. For, just as a statute if it is evil is no true statute, so also, an evil law is no law; and therefore, an evil custom can exist only in fact and can never establish a legal rule, unless the element of evil is taken away.—*Ibid.,* chap. vi, § 2.

The division of custom into good and bad is not the same as that into reasonable and unreasonable. The justification for this statement is found in the fact that the goodness and the evil [in customs] are derived from their objects, or from some law not forbidding the actions or forbidding them; their reasonableness or unreasonableness, however, should—it seems —be judged from their fitness for general usage and for customary law.— *Ibid.,* § 12.

A custom which has been found by a prudent judgment applying right reason to be unreasonable will also be condemned in natural law; and a

custom which has not been found unreasonable by right reason will not be condemned by the law.—Suárez, *De legibus,* Book VII, chap. vii, § 1.

A custom derived from error never has the effect of establishing law, even in its own subject-matter.—*Ibid.,* chap. xii, § 5.

A custom should emanate from a reason, and not from error. For if it has been established through error, upon discovery of the error, there disappears the apparent reason which might justify such a custom; and consequently the custom itself lapses also, because it cannot persist without a reason. Wherefore, even though the custom will seem to prevail and to establish law before the error is detected, it will do so only from an erroneous persuasion; for when the truth is known, the force of the custom vanishes. It was never, therefore, true law, but was merely thought to be such; and the same is true of the custom itself.—*Ibid.,* § 2.

For a custom to be established by the people, it is necessary that it be observed by at least the greater part of the community; and such observance is sufficient.—*Ibid.,* chap. ix, § 12.

Even though many may be ignorant of it, so long as that custom is known to the larger part of the community, this is sufficient.—*Ibid.,* § 14.

It is necessary that the observance of a custom be public, and consequently, that the customary actions be publicly performed.—*Ibid.,* chap. x, § 5.

In any inquiry as to the intention with which a custom is established, the following criteria will be of assistance.

First, if the custom is of long standing, and has to do with matters onerous and difficult, and if, finally, the custom is observed by the major part of the people—since the people do not commonly agree in the performance of acts of this sort save when they feel an obligation to do so—we have sound evidence that the people then are led [to act as they do] from a sense of obligation that is already established or is being established by it.

Secondly, if prudent and conscientious men think ill of those who do not observe the custom, or if the people generally are scandalized at non-observance of it, we have another strong indication of an intention on the part of the people to introduce consuetudinary law.

Thirdly, if the prelates or the governors of the realm gravely censure and punish those who do not follow the custom, that also is no slight indication.

Fourthly, if the subject-matter of the custom is evidently of itself of such advantage to the state that it may be prudently held that the binding force of the custom is highly expedient for the general welfare, the presumption is admissible, in a case of doubt, that the custom has been deliberately introduced.—*Ibid.*, chap. xv, § 13.[19]

The laws assert that a custom which is ancient, or of long standing, is sufficient to establish a legal rule; and ten years are necessary and sufficient for a custom to be termed ancient and of long standing.—*Ibid.*, § 2.

Interpretation of Custom

A custom can interpret not only written law, but itself also, as is clear from what has been said. The custom can do so because it also manifests the intention of those making use of it, although the custom itself is also to be interpreted by reason.—*Ibid.*, chap. xvii, § 6.

The decisions handed down by the courts are most of all effectual [in the interpretation of custom] in that they are received and approved by the common consent of the people.—*Ibid.*, § 4.

Alteration and Cessation of Custom[20]

Change in the written law can . . . be effected in two ways: in the one, the change is (as it were) intrinsic, that is, brought about by mere cessation due to conflicting circumstances; in the other, the alteration is induced by the contrary action of some external agency. Custom also can be changed in both these ways.—*Ibid.*, chap. xx, § 1.

A custom may . . . cease to exist on the sole ground of a change in the circumstances affecting the rectitude or the general usefulness of its subject-matter, and this, without a revocation by any external agency.—*Ibid.*

[19] "At the present time both in England and Scotland, a custom has to run the gauntlet of certain tests which may be classified:

"1) Legality. It must be a lawful practice. A *pactum illicitum* must not be mistaken for a custom. It must not be contrary to the general law, i.e. an understanding or misunderstanding of the law, however prevalent, does not amount to a custom.

"2) Reasonableness. A custom which is not fully known to both parties must be reasonable. An exaction of the nature of blackmail or a monopolist regulation resembles but does not amount to a custom. *Consuetudo rationem non vincit aut legem.*

"3) Definiteness. A custom must be definite. If it is not, it violates a principle which is a fundamental requisite of all law, customary or otherwise.

"4) Universality. A custom must be settled and established as distinguished from a mere multiplication of instances. It must, for example, be assented to by the whole of a trade."—*Law of Scotland, Sources and Juridical Organization,* by Stuart G. Kermack: *Travaux de l'Académie international de droit comparé,* Series I. *Fontes juris vigentis,* Fasc. 2 (Paris, 1933), p. 31.

[20] See also the rubric "Law in Opposition to Custom," *supra.*

Revocation of custom . . . is brought about by the prince through a law, or through an express declaration of his will, or . . . is effected by the people through an expression of a contrary will.—Suárez, *De legibus*, Book VII, chap. xx, § 2.

An ancient custom may be abrogated by a subsequent one, when due proportion is observed; that is, a universal custom by a universal one; and a particular custom by a particular one of the same locality—for customs of different places are not contrary, the one to the other.—*Ibid.*, § 19.

There may be a derogation . . . from a universal custom by a particular custom of a certain place; and finally, a custom universal within a certain locality can derogate from a particular one.—*Ibid.*

That which has in the first place been introduced, not by any rule but through error, and has afterwards been confirmed by custom, shall not prevail in other similar cases.—*Digest* I. iii. 39.

Human Law

Origin and Nature of Human Law

The law of man extends only to rational creatures subject to man.—St. Thomas Aquinas, I.–II, qu. 93, art. 5.

It belongs to the notion of human law, to be framed by that one who governs the community of the state.—*Ibid.*, qu. 95, art. 4.

The practical reason is concerned with practical matters, which are singular and contingent: but not with necessary things, with which the speculative reason is concerned. Wherefore human laws cannot have that inerrancy that belongs to the demonstrated conclusions of sciences.—*Ibid.*, qu. 91, art. 3, ad 3.

The natural law is a participation of the eternal law, . . . and therefore endures without change, owing to the unchangeableness and perfection of the Divine Reason, the Author of nature. But the reason of man is changeable and imperfect: wherefore his law is subject to change. Moreover the natural law contains certain universal precepts, which are everlasting: whereas human law contains certain particular precepts, according to various emergencies.—*Ibid.*, qu. 97, art. 1, ad 1.

Human law is a dictate of reason, whereby human acts are directed. Thus there may be two causes for the just change of human law: one

on the part of reason; the other on the part of man whose acts are regulated by law. The cause on the part of reason is that it seems natural to human reason to advance gradually from the imperfect to the perfect.—*Ibid.*, art. 1.

On the part of men, whose acts are regulated by law, the law can be rightly changed on account of the changed condition of man, to whom different things are expedient according to the difference of his condition. —*Ibid.*

Human law is rightly changed, in so far as such change is conducive to the common weal.—*Ibid.*, art. 2.

Human law is . . . the work of man, derived proximately from his power and wisdom, and ordained for its subjects as a rule and measure of their actions.—Suárez, *De legibus,* Book I, chap. iii, § 17.

[Human] law, then, is called human for the reason that it was devised and established proximately by men.—*Ibid.*

Although the civil law is not deduced speculatively (as it were) through an absolute inference drawn from the principles of the natural law, being, on the contrary, established by some act of determination, through the will of the prince; nevertheless, granting this assumption as to an act of determination, the conclusion that such a human law must—in actual practice, at least—be obeyed, is deduced from natural principles.—*Ibid.*, Book II, chap. ix, § 12.

That which plain or necessary reason bindeth men unto may be in sundry considerations expedient to be ratified by human law. . . . whereas men before stood bound in conscience to do as the law of reason teacheth, they are now by virtue of human law become constrainable, and if they outwardly transgress, punishable.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. x. 10.

As for laws which are *merely* human, the matter of them is any thing which reason doth but probably teach to be fit and convenient; so that till such time as law hath passed amongst men about it, of itself it bindeth no man.—*Ibid.*, 10.

The *law of man* (the which sometime is called the *law positive*) is derived by reason, as a thing which is necessary, and probably following of the law of reason, and of the law of God. And that is called *probable,* in

that it appeareth to many, and especially to wise men to be true. And therefore in every law positive well made, is somewhat of the law of reason, and of the law of God; and to discern the law of God and the law of reason from the law positive, is very hard. And though it be hard, yet it is much necessary in every moral doctrine, and in all laws made for the commonwealth. And that the law of man be just and rightwise, two things be necessary, and that is to say, wisdom and authority. Wisdom that he may judge after reason, what is to be done for the commonalty, and what is expedient for a peaceable conservation and necessary sustentation of them; authority, that he have authority to make laws.—St. Germain, *Doctor and Student* (16th ed.), pp. 10–11.

Human law [of individual communities] . . . is . . . divided into civil, and canon. For though canon law is of itself capable of being common to the whole world, even as the Catholic Church is universal, nevertheless, in point of fact, it is a law peculiar to the community of the Church of Christ, and not common to all nations, since they are not all a part of the Church. Furthermore, in the manner of its enactment, it is a positive human law in the strict sense, and of a very different character from that of the *ius gentium,* while in many respects it bears a likeness to the civil law. For these two branches of law agree in the fact that both in common possess the character of positive human law. One may note, however, that there exists between them a difference, consisting in the fact that civil law pertains entirely to the natural order in so far as regards its origin and authority, for though it is not enacted directly by nature, it is nevertheless enacted through the authority connatural to man. Canon law, on the other hand, is, properly speaking, that law which is enacted by man through a supernatural authority.—Suárez, *De legibus,* Book III, Introduction.

What else daily endangers and kills cities, country-sides, and individuals so much as the fresh accumulation of wealth on any one? Such an accumulation of wealth brings to light fresh desires which cannot be consummated without wrong to some one. And what else were the two branches of Law, I mean Canon and Civil Law, designed to remedy so much as that cupidity which grows by the amassing of riches? Certainly both branches of the Law make this sufficiently plain when we read their beginnings, that is, the beginning of their written record.—Dante, *Convivio,* Tractate IV, xii.

The Civil Law is something which is not entirely different from natural law or that of Nations, nor is it in everything subservient to it; and there-

fore when we add or take anything from the Common Law we constitute a separate law, that is the Civil Law.—*Digest* I. i. 6.

Those things which are derived from the law of nature by way of particular determination, belong to the civil law, according as each state decides on what is best for itself.—St. Thomas Aquinas, I.–II, qu. 95, art. 4.

Every definition in the Civil Law is subject to modification, for a slight discrepancy may render it inapplicable.—*Digest* L. xvii. 202.

The terms "disgrace" and "infamy" have the same signification. Some things are disgraceful from their very nature, others are made so by the Civil Law, and, as it were, by national custom.—*Ibid.*, xvi. 42.

Although a particular precept of the natural law may be observed by means of an act which is good in itself but which is, as a matter of fact, performed in an evil way, the natural law as a whole may not be thus observed; and in this respect, it differs from human law. For human law may be observed by means of an evil act, in such a way that no part of it is violated, since the evil attaching to the act in question is often opposed, not to any human precept, but to a natural precept.—Suárez, *De legibus*, Book II, chap. x, § 13.

Thus all law has been either made by consent, or established by necessity, or confirmed by custom.—*Digest* I. iii. 40.

Lex is a written ordinance.—Isidore, *Etymologies*, Book V, chap. iii, § 2.

By *lex* (a statute) is meant a written law which has been exhibited to the people that they may observe it.—St. Augustine, *On Eighty-Three Different Questions*, XXXI. 1.

The principle of every law established by our ancestors cannot be stated.—*Digest* I. iii. 20.

Human law has the nature of law in so far as it partakes of right reason; and it is clear that, in this respect, it is derived from the eternal law. But in so far as it deviates from reason, it is called an unjust law, and has the nature, not of law but of violence.—St. Thomas Aquinas, I.–II, qu. 93, art. 3, ad 2.

The natural law is a participation in us of the eternal law: while human law falls short of the eternal law.—*Ibid.*, qu. 96, art. 2, ad 3.

Human law is not derived directly from eternal law, but indirectly by way of the law of nature; so through the latter it has obligatory force in the forum of conscience. It is . . . in accordance with the law of nature that you shall not do to others that which you do not wish to be done to you; and consequently that you shall not establish for others a law which you do not wish to be applied to yourself. For this reason when any one establishes a law for others and not for himself, he violates the law of nature.—Cajetan, *On St. Thomas Aquinas,* I.–II, qu. 96, art. 5.

Every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law. . . .

Something may be derived from the natural law in two ways: first, as a conclusion from premisses, secondly, by way of determination of certain generalities. The first way is like to that by which, in sciences, demonstrated conclusions are drawn from the principles: while the second mode is likened to that whereby, in the arts, general forms are particularized as to details: thus the craftsman needs to determine the general form of a house to some particular shape. Some things are therefore derived from the general principles of the natural law, by way of conclusions; *e.g.,* that *one must not kill* may be derived as a conclusion from the principle that *one should do harm to no man:* while some are derived therefrom by way of determination; *e.g.,* the law of nature has it that the evil-doer should be punished; but that he be punished in this or that way, is a *determination* of the law of nature.

Accordingly, both modes of derivation are found in the human law. But those things which are derived in the first way, are contained in human law not as emanating therefrom exclusively, but have some force from the natural law also. But those things which are derived in the second way, have no other force than that of human law.—St. Thomas Aquinas, I.–II, qu. 95, art. 2.

We conclude that just as, in the speculative reason, from naturally known indemonstrable principles, we draw the conclusions of the various sciences, the knowledge of which is not imparted to us by nature, but acquired by the efforts of reason, so too it is from the precepts of the natural law, as from general and indemonstrable principles, that the human reason needs to proceed to the more particular determination of certain matters. These particular determinations, devised by human reason, are called human laws, provided the other essential conditions of law be observed.—*Ibid.,* qu. 91, art. 3.

There is a great difference between the nature of divine law and that of human law; since human law, not only as it exists in relation to its subjects but also as it exists in its own legislator, is something created and temporal, inasmuch as this law is formed and perfected in the mind and will of man, being, in the direct sense, a law of man and not a law of God Himself.—Suárez, *De legibus,* Book II, chap. iv, § 8.

The law in question, in so far as it exists in the subjects, is not so directly an effect of the eternal, as is the divine law itself. For human law is made known to its subject through the mediation of men, the latter being not only an incidental cause (so to speak) that is, not merely the cause that proposes and applies this law; but also the essential cause, or that which creates the law. For this law receives its force and efficacy directly from the will of a human legislator.—*Ibid.*

From the foregoing, there follows also the difference [that] . . . in the case of the divine law, the obligation is derived immediately from God Himself, since in so far as that law exists in man, it has no binding force save as it manifests the divine reason, or will. In human law, however, the obligation is not derived immediately from God; for in so far as human law exists in those who are subject thereto, it has an immediate relation to the will of the prince who has the power to establish a new law, distinct from divine law, and from his will the obligation directly emanates, although fundamentally this obligation proceeds in its entirety from the eternal law. —*Ibid.*

Purpose of Human Law

The civil law is that which any people or city establishes as its own law for human or divine reasons.—Isidore, *Etymologies,* Book V, chap. v.

The end of human law is the temporal tranquillity of the state.—St. Thomas Aquinas, I.–II, qu. 98, art. 1.

Human law is framed for a number of human beings, the majority of whom are not perfect in virtue.—*Ibid.,* qu. 96, art. 2.

It belongs to the notion of human law, to be ordained to the common good of the state.—*Ibid.,* qu. 95, art. 4.

Whatever is for an end should be proportionate to that end. Now the end of law is the common good; because, as Isidore says (*Etym.,* v. 21) that "law should be framed, not for any private benefit, but for the com-

mon good of all the citizens." Hence human laws should be proportionate to the common good. Now the common good comprises many things. Wherefore law should take account of many things, as to persons, as to matters, and as to times. Because the community of the state is composed of many persons; and its good is procured by many actions; nor is it established to endure for only a short time, but to last for all time by the citizens succeeding one another, as Augustine says (*De Civ. Dei,* ii. 21; xxii. 6).—St. Thomas Aquinas, I.–II, qu. 96, art. 1.

Human law is ordained for the civil community, implying mutual duties of man and his fellows: and men are ordained to one another by outward acts, whereby men live in communion with one another. This life in common of man with man pertains to justice, whose proper function consists in directing the human community. Wherefore human law makes precepts only about acts of justice; and if it commands acts of other virtues, this is only in so far as they assume the nature of justice, as the Philosopher explains (*Ethic.* v. 1).—*Ibid.,* qu. 100, art. 2.

Human law does not prohibit everything that is forbidden by the natural law.—*Ibid.,* qu. 96, art. 2, ad 3.

Human laws determine many points which have not been determined by the natural or the divine law, and which were not capable of being suitably determined by them.—Suárez, *De legibus,* Book II, chap. xiii, § 1.

Positive Law

The term "positive" is applied to that law which is not inherent in nature nor in grace, but has been laid down in addition to them by an extrinsic principle endowed with power, wherefore it is called "positive," having been added, as it were, to the natural law, not flowing therefrom of necessity.—*Ibid.,* Book I, chap. iii, § 13.

Positive law is divided into civil and ecclesiastical.—*Ibid.,* § 20.

The general principle of the natural law cannot be applied to all men in the same way on account of the great variety of human affairs: and hence arises the diversity of positive laws among various people.—St. Thomas Aquinas, I.–II, qu. 95, art. 2, ad 3.

The natural law may be regarded from either of two standpoints: from the one standpoint, as it is in itself; from the other, as it may happen to be laid down through some positive law.—Suárez, *De legibus,* Book II, chap. xvi, § 5.

Equity

Definition of Equity

It is equitable to pardon human weaknesses, and to look, not to the law but to the legislator; not to the letter of the law but to the intention of the legislator; not to the action itself, but to the moral purpose; not to the part, but to the whole; not to what a man is now, but to what he has been, always or generally; to remember good rather than ill treatment, and benefits received rather than those conferred; to bear injury with patience; to be willing to appeal to the judgment of reason rather than to violence; to prefer arbitration to the law court, for the arbitrator keeps equity in view, whereas the dicast looks only to the law, and the reason why arbitrators were appointed was that equity might prevail.—Aristotle, *Rhetoric,* I. xiii. 17–19.

Mercy has freedom in decision; it sentences not by the letter of the law, but in accordance with what is fair and good; it may acquit and it may assess the damages at any value it pleases. It does none of these things as if it were doing less than is just, but as if the justest thing were that which it has resolved upon.—Seneca, *De clementia,* II. vii. 3.

The institution of equity is twofold: [being found] sometimes in the laws (*legibus*) and sometimes in customs (*moribus*).—Isidore, *Etymologies,* Book II, chap. x, § 1.

Equity is justice that goes beyond the written law.—Aristotle, *Rhetoric,* I. xiii. 13.

Equity, while superior to one sort of justice, is itself just: it is not superior to justice as being generically different from it. Justice and equity are therefore the same thing, and both are good, though equity is the better.—Aristotle, *Nicomachean Ethics,* V. x. 2.

Equity, though just, is not legal justice, but a rectification of legal justice. The reason for this is that law is always a general statement, yet there are cases which it is not possible to cover in a general statement. In matters therefore where, while it is necessary to speak in general terms, it is not possible to do so correctly, the law takes into consideration the majority of cases, although it is not unaware of the error this involves. And this does not make it a wrong law; for the error is not in the law nor in the lawgiver, but in the nature of the case: the material of conduct is essentially

irregular. When therefore the law lays down a general rule, and thereafter a case arises which is an exception to the rule, it is then right, where the lawgiver's pronouncement because of its absoluteness is defective and erroneous, to rectify the defect by deciding as the lawgiver would himself decide if he were present on the occasion, and would have enacted if he had been cognizant of the case in question. Hence, while the equitable is just, and is superior to one sort of justice, it is not superior to absolute justice, but only to the error due to its absolute statement. This is the essential nature of the equitable: it is a rectification of law where law is defective because of its generality.—Aristotle, *Nicomachean Ethics,* V. x. 3–6.

Epieikeia corresponds properly to legal justice, and in one way is contained under it, and in another way exceeds it. For if legal justice denotes that which complies with the law, whether as regards the letter of the law, or as regards the intention of the lawgiver, which is of more account, then *epieikeia* is the more important part of legal justice. But if legal justice denote merely that which complies with the law with regard to the letter, then *epieikeia* is a part not of legal justice but of justice in its general acceptation, and is condivided with legal justice, as exceeding it.—St. Thomas Aquinas, II.–II, qu. 120, art. 2, ad 1.

The chief part of equity . . . is equality.—Seneca, *Epistulae morales* XXX. 11.

Equity, as the learned jurists define it, is a certain fitness of things which compares all things rationally, and seeks to apply like rules of right and wrong to like cases, being impartially disposed toward all persons, and allotting to each that which belongs to him. Of this equity the interpreter is the law, to which the will and intention of equity and justice are known. —John of Salisbury, *Policraticus,* IV. ii.

For the plainer declaration what equity is, thou shalt understand, that sith the deeds and acts of men, for which laws have been ordained, happen in divers manners infinitely, it is not possible to make any general rule of the law, but that it shall fail in some case: and therefore makers of laws take heed to such things as may often come, and not to every particular case, for they could not though they would. And therefore, to follow the words of the law were in some case both against justice and the commonwealth. Wherefore in some cases it is necessary to leave the words of the law, and to follow that reason and justice requireth, and to that intent equity is ordained; that is to say, to temper and mitigate the rigor of the

law. And it is called also by some men *epieikeia;* the which is no other thing but an exception of the law of God, or of the law of reason, from the general rules of the law of man, when they by reason of their generality would in any particular case judge against the law of God, or the law of reason: the which exception is secretly understood in every general rule of every positive law. And so it appeareth that equity taketh not away the very right, but only that that seemeth to be right by the general words of the law. For it is not ordained against the cruelness of the law, for the law in such case generally taken is good in itself; but equity followeth the law in all particular cases where right and justice requireth, notwithstanding the general rule of the law be to the contrary. Wherefore it appeareth that if any law were made by man without any such exception expressed or implied, it were manifestly unreasonable, and were not to be suffered: for such causes might come, that he that would observe the law, should break both the law of God and the law of reason. . . . And so it appeareth that equity rather followeth the intent of the law, than the words of the law.—St. Germain, *Doctor and Student* (16th ed.), pp. 45–46.

Aequitas is customarily interpreted as having a twofold sense. In one sense, it stands for natural equity, which is identical with natural justice. . . .

Aequitas may be taken in another sense, however, as being a prudent moderation of the written law (*lex scripta*), transcending the exact literal interpretation of the latter. . . . To this [form of equity] does it pertain to act, in particular cases, in opposition to the words of human law (*lex*), when the observance of that law would be contrary to natural equity. Under such circumstances, indeed, the judge is said to act, not according to law (*iure*)—not at least, according to the letter of the law as it stands—but in accordance with what is equitable and good; and this, [in turn,] is to observe the law (*ius*) itself, with respect to its intention, while the contrary mode of action would be to violate the law.—Suárez, *De legibus,* Book I, chap. ii, §§ 9, 10.

Law constitutes equity, or is the measure and rule thereof, but is not properly speaking equity itself.—*Ibid.,* § 6.

An exception from law through privilege is not *epieikeia.—Ibid.,* Book II, chap. xvi, § 7.

Relation of Equity to Natural Law

Natural law, so far as it contains general precepts, which never fail, does not allow of dispensation. In the other precepts, however, which are as

conclusions of the general precepts, man sometimes grants a dispensation; for instance, that a loan should not be paid back to the betrayer of his country, or something similar.—St. Thomas Aquinas, I.–II, qu. 97, art. 4, ad 3.

True *epieikeia* has no place in any natural precept, in so far as the latter is natural; that is to say in so far as it is viewed in the light of its inherent nature.—Suárez, *De legibus,* Book II, chap. xvi, § 7.

Epieikeia is an emendation of a law, or of that which is legally just. But the natural law cannot be amended, inasmuch as it is founded upon right reason, which is unable to be deficient in truth, since in so doing it would no longer be right reason.—*Ibid.,* § 9.

Application of Equity

In all matters, and especially in those relating to the law, equity must be considered.—*Digest* L. xvii. 90.

Although the formalities required by law are not easily changed, still relief should be granted where equity clearly demands it.—*Ibid.,* 183.

Just as one can make use of a balance to determine the weight of anything when the scales are perfectly equal and do not incline more to one side than the other, so a law is worthy of serving as a rule for the decision of litigation, when it contains nothing which tends to the perversion or corruption of justice. The use of the former is to preserve equilibrium, and of the latter to maintain equity.—*New Constitutions of the Emperor Leo,* Const. XXI.

Even as unjust laws by their very nature are, either always or for the most part, contrary to the natural right, so too laws that are rightly established, fail in some cases, when if they were observed they would be contrary to the natural right. Wherefore in such cases judgment should be delivered, not according to the letter of the law, but according to equity which the lawgiver has in view. Hence the jurist says [Justinian, *Digest* I. iii. 25]: "By no reason of law, or favour of equity, is it allowable for us to interpret harshly, and render burdensome, those useful measures which have been enacted for the welfare of man."[21] In such cases even the lawgiver himself would decide otherwise; and if he had foreseen the case, he might have provided for it by law.—St. Thomas Aquinas, II.–II, qu. 60, art. 5, ad 2.

[21] This passage from the *Digest* is also given *supra,* p. 43, under the rubric "Interpretation of Law."

He who is placed over a community is empowered to dispense in a human law that rests upon his authority, so that, when the law fails in its application to persons or circumstances, he may allow the precept of the law not to be observed. If however he grants this permission without any such reason, and of his mere will, he will be an unfaithful or an imprudent dispenser: unfaithful, if he has not the common good in view; imprudent, if he ignores the reasons for granting dispensations.—*Ibid.*, I.–II, qu. 97, art. 4.

Precepts admit of dispensation, when there occurs a particular case in which, if the letter of the law be observed, the intention of the lawgiver is frustrated. Now the intention of every lawgiver is directed first and chiefly to the common good; secondly, to the order of justice and virtue, whereby the common good is preserved and attained. If therefore there be any precepts which contain the very preservation of the common good, or the very order of justice and virtue, such precepts contain the intention of the lawgiver, and therefore are indispensable. For instance, if in some community a law were enacted, such as this,—that no man should work for the destruction of the commonwealth, or betray the state to its enemies, or that no man should do anything unjust or evil, such precepts would not admit of dispensation. But if other precepts were enacted, subordinate to the above, and determining certain special modes of procedure, these latter precepts would admit of dispensation, in so far as the omission of these precepts in certain cases would not be prejudicial to the former precepts which contain the intention of the lawgiver. For instance if, for the safeguarding of the commonwealth, it were enacted in some city that from each ward some men should keep watch as sentries in case of siege, some might be dispensed from this on account of some greater utility.—*Ibid.*, qu. 100, art. 8.

Legislators in framing laws attend to what commonly happens: although if the law be applied to certain cases it will frustrate the equality of justice and be injurious to the common good, which the law has in view. Thus the law requires deposits to be restored, because in the majority of cases this is just. Yet it happens sometimes to be injurious—for instance, if a madman were to put his sword in deposit, and demand its delivery while in the state of madness, or if a man were to seek the return of his deposit in order to fight against his country. In these and like cases it is bad to follow the law, and it is good to set aside the letter of the law and to follow the dictates of justice and the common good. This is the object of *epieikeia* which we

call equity. Therefore it is evident that *epieikeia* is a virtue.—*Ibid.*, II.–II, qu. 120, art. 1.

Often—or rather, always—laws require interpretation because of the obscurity or ambiguity of their terms or for other, similar causes; yet not every interpretation of this kind is an instance of *epieikeia,* but only those interpretations in which we consider a law as failing in some particular instance, owing to its universal character—that is, owing to the fact that it was established for all cases and so fails to meet the requirements of some given instance that it cannot justly be observed [Cajetan, *On St. Thomas Aquinas,* II.–II, qu. 120, art. 1].—Suárez, *De legibus,* Book II, chap. xvi, § 4.

When a person is dispensed from observing the general law, this should not be done to the prejudice of, but with the intention of benefiting, the common good.—St. Thomas Aquinas, I.–II, qu. 97, art. 4, ad 1.

He who in a case of necessity acts beside the letter of the law, does not judge of the law; but of a particular case in which he sees that the letter of the law is not to be observed.—*Ibid.,* qu. 96, art. 6, ad 1.

It would be passing judgment on a law to say that it was not well made; but to say that the letter of the law is not to be observed in some particular case is passing judgment not on the law, but on some particular contingency.—*Ibid.,* II.–II, qu. 120, art. 1, ad 2.

Nevertheless it must be noted, that if the observance of the law according to the letter does not involve any sudden risk needing instant remedy, it is not competent for everyone to expound what is useful and what is not useful to the state: those alone can do this who are in authority, and who, on account of suchlike cases, have the power to dispense from the laws. If, however, the peril be so sudden as not to allow of the delay involved by referring the matter to authority, the mere necessity brings with it a dispensation, since necessity knows no law.—*Ibid.,* I.–II, qu. 96, art. 6.

Epieikeia does not set aside that which is just in itself but that which is just as by law established. Nor is it opposed to severity, which follows the letter of the law when it ought to be followed. To follow the letter of the law when it ought not to be followed is sinful. Hence it is written in the *Codex of Laws and Constitutions* under *Law* v.:[22] "Without doubt he transgresses the law who by adhering to the letter of the law strives to defeat the intention of the lawgiver."—*Ibid.,* II.–II, qu. 120, art. 1, ad 1.

[22] *Code* I. xiv. 5. The passage here quoted is given at greater length *supra,* p. 42, under the rubric "Interpretation of Law."

In all these voluntary activities, there is a certain equity to be preserved, and a certain breach of equity to be avoided; and this equity may be destroyed for two reasons, either through not knowing what it is, or through not wishing to follow it; written Law was invented in order both to demonstrate and to prescribe it. Hence Augustine says that "If men had known it (namely, equity), and had upheld it when known, there would have been no need of written law." Therefore in the beginning of the Old Digest it is set down that "Written Law is the art of well-doing and of equity."—Dante, *Convivio,* Tractate IV, ix.

For some of them [statutes pertaining to the *ius gentium*] are so universally true that they never under any circumstances lapse. Examples of these are the prohibition against lying, that against the commission of adultery, and other precepts of the same kind. Such statutes, since they cannot lapse, afford no occasion for equity. There are others, however, whose content is in the majority of instances righteous, but which would lead one away from the righteous path if they were to be observed in certain [special] instances. For example, it is in general right that deposits should be returned; and yet, since there are cases in which the return of a deposit would involve injustice, we must seek some other guide to conduct, for those occasions on which the natural law concerning deposits is defective. And this guide we call, "the virtue of equity."—Cajetan, *On St. Thomas Aquinas,* II.–II, qu. 120, art. 1.

Accordingly, equity is not involved [simply] because a law is defective, or is suspected of being defective, by reason of the obscurity or ambiguity of its meaning. For the authoritative [i.e., practical] interpretation of laws is a function of the prince, while their theoretical interpretation is a function of the jurisconsults. Wherefore our text declares (art. 1, ad 3) that equity plays a part only where the law is manifestly defective and where execution—not deliberation—is demanded.—*Ibid.*

It is therefore manifest that equity is the guide for both forms of law—namely, strict positive law and defective natural law—with respect to acts for which [the said forms] are defective; though not [when they are defective simply] in any way whatsoever, but [when they are so] in consequence of having been laid down in universal terms. For if, in a given case, a law lapses because of a privilege involving a prescription that differs from what is prescribed by ordinary (*communis*) law, the direction of the acts pertaining to this privilege has no relation to equity; since, in such a case, the law fails not by reason of its universal character but because the

legislator has repealed it in so far as concerns the persons privileged. And the same argument applies to all instances in which the law fails for any reason other [than its universality]; for the direction of law pertains to equity only when the law is defective on account of its universal nature. —Cajetan, *On St. Thomas Aquinas,* II.–II, qu. 120, art. 1.

For it is not the function of equity to decide whether or not the law is to be observed in a particular case; its function is, rather, to direct when the law fails manifestly, by reason of its universal character.—*Ibid.*

Equity, to which the judge owes obedience, does not know the left hand of hatred nor the right hand of love; because in judgments it is not permissible to deviate from the right line of the truth.—John of Salisbury, *Policraticus,* V. xii.

Who does not know "that in all matters the consideration of justice and equity prevails over the strict interpretation of the law?" That the law of equity is superior to the letter of the law? That the meaning is more than the words? That the good and the fair are law?—Gentili, *De jure belli,* Book I, chap. xxi.

An exception based upon fine points of law is not suited to those who desire to be considered thoroughly trustworthy, and such an exception is not admitted in courts governed by equity alone.—*Ibid.,* Book III, chap. xiv.

It is but just, and in accordance with the Law of Nations that no one, by the commission of an injury, can be enriched at the expense of another.—*Digest* L. xvii. 206.

Before the Court

Causa (a law case) is so called from the occasion (*casu*) out of which it arises. For it is the matter and origin of the affair, not yet made clear by examination of the points in discussion; which, when it is brought up, is a law case, but when it is settled, is a judgment, and, when terminated, it is justice. But judgment (*iudicium*) is called, as it were, "declaring the law" (*iurisdictio*); and justice (*iustitia*) is as it were the status of the law (*iuris status*).—Isidore, *Etymologies,* Book XVIII, chap. xv, § 2.

An action is nothing else but the right to recover what we are entitled to by means of a judicial proceeding.—*Digest* XLIV. vii. 51.

In courts of law, though there be no prejudice, guilt is punished; and if there be no guilt, prejudice is put aside.—Cicero, *Pro Cluentio* ii. 5.

In judicial proceedings the party who keeps silent is always regarded as the consenting party, and this case expounders of the law everywhere accept. —Gentili, *Hispanicae advocationis,* Book II, chap. xi.

A man's cause is proved to be bad when he will not submit it to examination, and we ought never to shrink from an investigation of our claims.—Gentili, *De jure belli,* Book I, chap. xx.

The Qualifications of the Judge

A judge (*iudex*) is so called, because he declares the law (*ius dicat*) to the people, or determines by law. But to determine by law, is to judge justly. For he is no judge, if there is no justice in him.—Isidore, *Etymologies,* Book XX, chap. xv, § 6.

The greatest precautions ought to be taken that the heads of churches, and those who preside over public trials are in no wise hasty in passing sentences, being moved by levity or passion; but, the cases having been diligently aired beforehand, when the facts which were unknown have become fully known, then the divine and human law is looked into, and, in accordance with their provisions, definitive sentence, free from personal prejudice, is delivered.—Gratian, *Decretum,* Part II, causa xi, qu. iii, can. lxx, citing Gregory the Great.

It appears . . . that judgment must always be according to the law when this is possible, but since human actions and cases which may arise cannot [always] be rightly decided or settled by the laws, it is fitting that those who are to judge should be wise and discreet in order that they may understand how to decide in the future those matters which have not been settled by the laws.—Egidio Colonna, *Li Livres du gouvernement des rois,* Book III, Part II, chap. xviii.

It is expedient, in order that judges may render fair and legal judgment, that they possess four qualities, that is to say . . . that they have power and authority to render judgment, that they have knowledge of the laws and customs, that they possess the qualities of rectitude and justice, and that they be widely experienced in human affairs and activities.—*Ibid.,* chap. xx.

The duty of a judge and his religion should include the following things: he ought to have a knowledge of law, a will disposed toward good, and adequate power to enforce his decision, and he should be bound by an oath to keep the laws.—John of Salisbury, *Policraticus,* V. xi.

Anyone who desires to be a pleader cannot act as advocate and judge in the same case, since a distinction must exist between those who decide cases and those who argue them.—*Code* II. vi. 6.

No one shall act as judge in his own case, or interpret the law for himself, as it would be very unjust to give anyone the right to render a decision in an affair which is his own.—*Ibid.*, III. v. 1.

He who presides over the administration of justice ought not to render judgment in his own case, or in that of his wife or children, or of his freedmen, or of any others whom he has with him.—*Digest* II. i. 10.

A judge should not be intimidated by the influence or personal importance of the litigants.—John of Salisbury, *Policraticus,* V. xii.

A judge is not permitted to sell a just judgment, although a lawyer may sell a just legal defence, and a jurist may sell good advice.—Gratian, *Decretum,* Part II, causa xi, qu. iii, can. lxxi, citing Augustine, *Letters,* liv, "To Macedonius."

Duties of the Judge

Judges are called, as it were, "those declaring the law to the people" (*ius dicentes*), or they are so called because they determine cases by law (*iure disceptent*). But he is no judge, if there is no justice in him.—Isidore, *Etymologies,* Book IX, chap. iv, § 14.

The act of a judge is . . . wont to be designated by the term *ius,* either because it ought to be performed in accordance with the laws (*leges*), or because it sometimes seems to establish a law (*lex*), as it were; so that the judge, when he exercises his office, is said to declare the law (*ius dicere*).—Suárez, *De legibus,* Book I, chap. ii, § 8.

Certain individual facts which cannot be covered by the law "have necessarily to be committed to judges," as the Philosopher says in the same passage:[23] for instance, "concerning something that has happened or not happened," and the like.—St. Thomas Aquinas, I.–II, qu. 95, art. 1, ad 3.

The kings of the Egyptians, in accordance with a rule of their own, used to require their judges to swear that, even if the king should direct them to decide any case unfairly, they would not do so.—Plutarch, *Moralia:* "Sayings of Kings and Commanders," p. 174c.

[23] *Rhetoric,* I. i. 8. The passage from Aristotle here referred to is quoted at length, *infra,* p. 225, under the rubric "Legislation of the State—Its Nature and Function."

In Thebes there were set up statues of judges without hands, and the statue of the chief justice had its eyes closed, to indicate that justice is not influenced by gifts or by intercession.—*Ibid.*, "Isis and Osiris," p. 355A.

A judge renders to each one what belongs to him, by way of command and direction, because a judge is the "personification of justice," and "the sovereign is its guardian" (*Ethic.* v. 4). On the other hand, the subjects render to each one what belongs to him, by way of execution.—St. Thomas Aquinas, II.–II, qu. 58, art. 1, ad 5.

To go to a judge is to go to justice, for the ideal judge is so to speak justice personified.—Aristotle, *Nicomachean Ethics,* V. iv. 7.

Judgment properly denotes the act of a judge as such. Now a judge (*iudex*) is so called because he asserts the right (*ius dicens*) and right is the object of justice, as stated above (Q. LVII., A. I).[24] Consequently the original meaning of the word "judgment" is a statement or decision of the just or right. . . . Therefore judgment, which denotes a right decision about what is just, belongs properly to justice. For this reason the Philosopher says (*Ethic.* v. 4) that "men have recourse to a judge as to one who is the personification of justice."—St. Thomas Aquinas, II.–II, qu. 60, art. 1.

Since judgment should be pronounced according to the written law, as stated above (A. 5), he that pronounces judgment, interprets, in a way, the letter of the law, by applying it to some particular case. Now since it belongs to the same authority to interpret and to make a law, just as a law cannot be made save by public authority, so neither can a judgment be pronounced except by public authority, which extends over those who are subject to the community. Wherefore even as it would be unjust for one man to force another to observe a law that was not approved by public authority, so too it is unjust, if a man compels another to submit to a judgment that is pronounced by other than the public authority.—*Ibid.*, II.–II, qu. 60, art. 6.

It is one thing to judge of things and another to judge of men. For when we judge of things, there is no question of the good or evil of the thing about which we are judging, since it will take no harm no matter what kind of judgment we form about it; but there is question of the good of the person who judges, if he judge truly, and of his evil if he judge falsely because the true is "the good of the intellect, and the false is its evil," as

[24] See *supra*, p. 21, under the rubric "Justice."

stated in *Ethic.* vi. 2, wherefore everyone should strive to make his judgment accord with things as they are. On the other hand when we judge of men, the good and evil in our judgment is considered chiefly on the part of the person about whom judgment is being formed; for he is deemed worthy of honour from the very fact that he is judged to be good, and deserving of contempt if he is judged to be evil. For this reason we ought, in this kind of judgment, to aim at judging a man good, unless there is evident proof of the contrary. And though we may judge falsely, our judgment in thinking well of another pertains to our good feeling and not to the evil of the intellect.—St. Thomas Aquinas, II.–II, qu. 60, art. 4, ad 2.

A judge's sentence is like a particular law regarding some particular fact. Wherefore just as a general law should have coercive power, as the Philosopher states (*Ethic.* x. 9), so too the sentence of a judge should have coercive power, whereby either party is compelled to comply with the judge's sentence; else the judgment would be of no effect. Now coercive power is not exercised in human affairs, save by those who hold public authority: and those who have this authority are accounted the superiors of those over whom they preside whether by ordinary or by delegated authority. Hence it is evident that no man can judge others than his subjects and this in virtue either of delegated or of ordinary authority.—*Ibid.*, qu. 67, art. 1.

Judgments emanate through the official pronouncement of certain men who are at the head of affairs, and in whom the judicial power is vested. Now it belongs to those who are at the head of affairs to regulate not only litigious matters, but also voluntary contracts which are concluded between man and man, and whatever matters concern the community at large and the government thereof. Consequently the judicial precepts are not only those which concern actions at law; but also all those that are directed to the ordering of one man in relation to another, which ordering is subject to the direction of the sovereign as supreme judge.—*Ibid.*, I.–II, qu. 104, art. 1, ad 1.

A judge is an interpreter of justice. Wherefore, as the Philosopher says (*Ethic.* v. 4), "men have recourse to a judge as to one who is the personification of justice." Now, as stated above (Q. LVIII., A. 2), justice is not between a man and himself but between one man and another. Hence a judge must needs judge between two parties, which is the case when one is the prosecutor [plaintiff], and the other the defendant. Therefore in criminal cases the judge cannot sentence a man unless the latter has an accuser.—*Ibid.*, II.–II, qu. 67, art. 3.

Two things may be observed in connection with a judge. One is that he has to judge between accuser and defendant, while the other is that he pronounces the judicial sentence, in virtue of his power, not as a private individual but as a public person. Accordingly on two counts a judge is hindered from loosing a guilty person from his punishment. First on the part of the accuser, whose right it sometimes is that the guilty party should be punished,—for instance on account of some injury committed against the accuser,—because it is not in the power of a judge to remit such punishment, since every judge is bound to give each man his right. Secondly, he finds a hindrance on the part of the commonwealth, whose power he exercises, and to whose good it belongs that evil-doers should be punished.

Nevertheless in this respect there is a difference between judges of lower degree and the supreme judge, i.e., the sovereign, to whom the entire public authority is entrusted. For the inferior judge has no power to exempt a guilty man from punishment against the laws imposed on him by his superior.—*Ibid.*, art. 4.

Among those temporal laws, although men may judge concerning them when they are establishing them, nevertheless, once they are established and instituted, a judge is not permitted to judge concerning them, but according to them.—St. Augustine, *On the True Religion,* I. xxxi.

A judge ought to be careful not to decide in any other way than is prescribed by the laws, the constitutions or the customs.—*Institutes* IV. xvii.

Every judge or magistrate invested with judicial authority shall observe the laws, and render judgment in conformity to them; even if, in the meantime, he should have received an order, an Imperial notice, or a pragmatic sanction from Us directing him to decide in a different manner, for We desire that what Our laws prescribe shall be observed.—*Constitutions of Justinian,* Sixth Collection, XI [X]. xiii.

Judges should be bound to the laws by an oath, since they are always to dispense judgment in accordance with truth and in obedience to the laws.—John of Salisbury, *Policraticus* V. xii.

By all authorities the principle is recognized that the discretion of the judge ought to be governed by the law.—Gentili, *Hispanicae advocationis,* Book II, chap. ix.

We decree that all suits which are brought for the recovery of any sum of money whatsoever, or with reference to civil conditions, the rights of

cities or of private individuals; the possession, ownership, or hypothecation of property, servitudes; or any other questions on account of which litigation occurs between men; with the sole exception of such cases as involve the rights of the Treasury, or the discharge of official duties, shall not, after issue has been joined, be deferred longer than the term of three years.

All judges, either in this Fair City or in the provinces, whether they are invested with inferior or superior jurisdiction, or discharge the functions of magistrates, or have been appointed by Us, or by Our nobles, shall not be permitted to protract cases for a longer time than the term of three years.—*Code* III. i. 11, § 1.

A just case is in a better position if it is brought before a judge than if it is brought before an "arbiter," because the judge is restricted by the formula of instructions, which sets definite bounds that he cannot exceed, whereas the other has entire liberty of conscience and is hampered by no bonds; he can lessen the value of some fact or augment it, and can regulate his opinion, not according to the dictates of law or justice, but according to the promptings of humanity or pity.—Seneca, *De beneficiis* III. vii. 5–6.

Even if judges inflict punishments on wrong-doers, it does not follow that the power of life and death is theirs, for they are strictly limited by the laws and have no power to remit the death penalty where it has been deserved, it being an attribute of the sovereign to determine when to temper law with mercy.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. vi, § 10.

Reason is the rule. Cases are cases, and do not restrict reason or the rule which comes from reason.—Gentili, *Hispanicae advocationis,* Book II, chap. xi.

Failure of the Judge in the Performance of His Duties

When a judge has been appointed to decide a certain matter, and renders an opinion with reference to others which have no connection with it, he performs an act which is void in law.—*Code* VII. xlviii. 1.

If a decision has been rendered directly against the strict interpretation of the law, it should not be valid, and therefore the case can be heard again without an appeal.—*Digest* XLIX. i. 19.

If a judge should render an improper decision, he is not, strictly speaking, considered to be liable on account of a crime, nor is he bound by

virtue of a contract; still, as he has committed a fault, even if this was done through ignorance, he is considered to be liable on account of a quasi offence.—*Ibid.*, XLIV. vii. 5, § 4.

When judges . . . are unable to distinguish what is equitable, they dishonor the judicial office; and would it not be extremely injurious to the government not to entrust the disposal of litigation to those who themselves ought to know what to do, but permit them to seek for others from whom they may be able to learn what they themselves should be familiar with in rendering judgment?—*Constitutions of Justinian,* Sixth Collection, XI [X], Preface.

Decisions rendered by corrupt judges for the sake of reward are void in law, even if no appeal should be taken.—*Code* VII. lxiv. 7.

Judges who have been convicted of having been polluted by dishonesty and other crimes shall be deprived of their commissions and dignities, and degraded to the lowest rank of plebeians, nor shall they afterwards enjoy those honors of which they have shown themselves to be unworthy.—*Ibid.*, XII. i. 12.

Avarice is the mother of all crime; especially when it is not confined to private persons, but even takes possession of the minds of magistrates.—*Constitutions of Justinian,* Second Collection, II, Preface.

He who judges rightly, but looks for a reward by way of recompense, commits an offence against God, because, by accepting money, he sells justice, which ought to be given free. They who judge justly for a temporal gain, make bad use of good things. Certainly it is not the defence of justice which provokes such persons to truth, but the love of gain; if hope of money is withdrawn from them, they cease to profess justice. Such an acceptance of money is a violation of the truth. Whence it is said in behalf of the just man: "He that [. . .] shaketh his hands from all bribes [. . .] shall dwell on high" (*Isaiah,* chap. xxxiii, vv. 15–16).—Gratian, *Decretum,* Part II, cau. xi, qu. iii, can. lxvi, citing Gregory the Great.[25]

An unjust judgment, and an unjust definition, arranged by fear of the king, or ordered by the judges, has no force.—*Ibid.*, cau. xxv, qu. i, can. viii, citing Pope Marcellus, *Letters,* ii.

[25] This passage is not found in Gregory's works but in Isidore, *De summo bono,* Book III, chap. liv.

Judgment

It is sufficient for knowledge to know that something is or is not so; but for a judgment, we add something, by which we mean that it can be, . . . as, for instance, when we say "It must be so"; "It must have been so," or "It should be so," as artisans do, when they are at work.—St. Augustine, *On the True Religion,* I. xxxi.

Iudicatum (a judicial decision) is what has been already laid down in a sentence concerning the affair of any person or persons.—*Ibid., On Eighty-Three Different Questions,* XXXI. 1.

Justice is in the sovereign as a master virtue, commanding and prescribing what is just; while it is in the subjects, as an executive and administrative virtue. Hence judgment, which denotes a decision of what is just, belongs to justice, considered as existing chiefly in one who has authority. —St. Thomas Aquinas, II.–II, qu. 60, art. 1, ad 4.

But that no one can be condemned without a judicial order is proven by many authors. For on this point Augustine[26] says: "We cannot pass sentence against anyone, except he be either convicted, or freely confessed." The Emperor Constantine states:[27] "A judge investigating a crime may not pronounce sentence before the accused either confesses his guilt or is convicted by innocent witnesses." Augustine bears witness to the same thing, and in the same words. Gregory[28] says on this point: "Just as we do not wish anyone to be condemned without judgement, so we do not permit those things which have been justly determined to be put off by any plea [or excuse—*excusatione*]." On the same point is the statement of Bishop Elutherius [to the Bishop of Gaul]: "Let nothing be charged against anyone whomsoever, without a lawful and sufficient accuser."—Gratian, *Decretum,* Part II, cau. ii, qu. i. cans. i, ii, iii, iv, citing Augustine, Constantine, Gregory, and Bishop Elutherius.

Judgment is nothing else but a decision or determination of what is just. Now a thing becomes just in two ways: first by the very nature of the case, and this is called natural right, secondly by some agreement between men, and this is called positive right, as stated above[29] (Q. LVII., A. 2). Now laws are written for the purpose of manifesting both these rights, but

[26] *Homilies,* L, *De utilitate penitentiae.*
[27] Also found in *Theodosian Code,* Book IX, tit. xl.
[28] Gregory the Great, *Letters,* Book VIII, letter 50.
[29] The passage here referred to is quoted *supra,* p. 4, under the rubric "Right (*Ius*)."

in different ways. For the written law does indeed contain natural right, but it does not establish it, for the latter derives its force, not from the law but from nature: whereas the written law both contains positive right, and establishes it by giving it force of authority.

Hence it is necessary to judge according to the written law, else judgment would fall short either of the natural or of the positive right.—St. Thomas Aquinas, II.–II, qu. 60, art. 5.

Just as the written law does not give force to the natural right, so neither can it diminish or annul its force, because neither can man's will change nature. Hence if the written law contains anything contrary to the natural right, it is unjust and has no binding force. For positive right has no place except where *it matters not,* according to the natural right, *whether a thing be done in one way or in another.* . . . Wherefore such documents [precepts] are to be called, not laws, but rather corruptions of law, . . . and consequently judgment should not be delivered according to them.—*Ibid.,* ad 1.

Three conditions are requisite for a judgment to be an act of justice: first that it proceed from the inclination of justice; secondly, that it come from one who is in authority; thirdly, that it be pronounced according to the right ruling of prudence.—*Ibid.,* art. 2.

Whenever a decision cannot be rendered without causing injury, that course should be adopted which is productive of the least injustice.—*Digest* L. xvii. 200.

Appeals

The power of appeal is granted in cases of great as well as minor importance, and the judge should not think that he has sustained any injury because the litigant has had recourse to an appeal.—*Code* VII. lxii. 20.

Not only is he who is brought to punishment permitted to appeal, but also others in his name; and not only when he himself directs this to be done, but where anyone else desires to appeal he can do so, nor does it make any difference whether he is nearly related to the defendant or not; for I think that on the ground of humanity every person who appeals should be heard.—*Digest* XLIX. i. 6.

It is not customary to reject the appeal of those who have at least one good ground for appeal.—*Ibid.,* 13, § 1.

There is no one who is not aware how frequently appeals are employed, and how necessary they are to correct the injustice or the ignorance of judges; although sometimes sentences which have been properly imposed are changed for the worse.—*Digest* XLIX. i. 1.

An appeal is not reasonable in the case of one who could foresee a situation and make clear his right, for the presumption is that in such circumstances he would be appealing for the sake of causing delay.—Gentili, *Hispanicae advocationis,* Book II, chap. viii.

Res Iudicata

By *res iudicata* is meant the termination of a controversy by the judgment of a court. This is accomplished either by an adverse decision, or by a discharge from liability.—*Digest* XLII. i. 1.

It has very reasonably been held that one action is sufficient for the settlement of a single controversy, and one judgment for the termination of a case; otherwise, litigation would be enormously increased, and would be productive of insurmountable difficulties, especially where conflicting decisions have been rendered. It is therefore very common to introduce an exception on the ground of *res iudicata.—Ibid.,* XLIV. ii. 6.

Precedents

Anything which is established against a rule of law should not become a precedent.—*Ibid.,* L. xvii. 141.

Any act performed through necessity should not be cited as a precedent. —*Ibid.,* 162.

Penalties and Punishment

He who obeys the law will never know the fatal consequences of disobedience, but he who despises the law shall be liable to a double penalty, the first coming from the Gods, and the second from the law.—Plato, *Laws,* VIII, p. 843.

The natural law requires punishment to be inflicted for guilt, and that no one should be punished who is not guilty; but the appointing of the punishment according to the circumstances of person and guilt belongs to positive law.—St. Thomas Aquinas, *Summa,* Part III (Supplement), qu. 52, art. 1, ad 3.

Natural right and natural law teach that thieves and malefactors must be punished . . . and natural reason teaches many other things; but that thieves and malefactors should be punished in this manner or that . . . is not a matter of natural right but rather of the laws and regulations of the people or the prince. Therefore we see that in all countries where peoples wish to live happily and in peace, it is expedient that malefactors and their evil deeds be punished, as natural law teaches; yet the same crime is never punished by one and the same penalty in various countries but rather in accordance with the penal laws of each country. And therefore the Philosopher says that the laws established by the prince or by the people commence where the law of nature ends.—Egidio Colonna, *Li Livres du gouvernement des rois,* Book III, Part II, chap. xxii.

Purpose of Punishment

Now the proper office of punishment is twofold: he who is rightly punished ought either to become better and profit by it, or he ought to be made an example to his fellows, that they may see what he suffers, and fear and become better.—Plato, *Gorgias,* p. 525.

Law, even by punishing, leads men on to being good.—St. Thomas Aquinas, I.–II, qu. 92, art. 2, ad 4.

No one suffers a penalty for merely thinking.—*Digest* XLVIII. xix. 18.

When you punish a man who breaks the laws, you are not delivering him over to his accusers; you are strengthening the arm of the law in your own interests.—Demosthenes, *Against Meidias,* § 30.

What is the strength of the laws? . . . Wherein then resides their power? In yourselves, if only you support them and make them all-powerful to help him who needs them. So the laws are strong through you and you through the laws. Therefore you must help them as readily as any man would help himself if wronged; you must consider that you share in the wrongs done to the laws, by whomsoever they are found to be committed; and no excuse—neither public services, nor pity, nor personal influence, nor forensic skill, nor anything else—must be devised whereby anyone who has transgressed the laws shall escape punishment.—*Ibid.,* §§ 224–25.

Not in vain were the royal power, the *ius cognitoris,* the hooks of the public executioner, the arms of the soldier, the discipline of rulers, even the severity of a good father, instituted: all these things have their limits, causes,

reasons, uses. When they are feared, both the evil are punished, and the good live in peace among the evil.—Gratian, *Decretum*, Part II, cau. xxiii, qu. v, can. xviii, citing Augustine, *Letters*, liv, "To Macedonius."

As all the members of the body are in harmony one with another because it is to the advantage of the whole that the individual members be unharmed, so mankind should spare the individual man, because all are born for a life of fellowship, and society can be kept unharmed only by the mutual protection and love of its parts. . . . Neither . . . shall we injure a man because he has done wrong, but in order to keep him from doing wrong, and his punishment shall never look to the past, but always to the future.—Seneca, *De ira* II. xxxi. 7–8.

It becomes a guardian of the law, the ruler of the state, to heal human nature by the use of words, and these of the milder sort, as long as he can, to the end that he may persuade a man to do what he ought to do, and win over his heart to a desire for the honourable and the just, and implant in his mind hatred of vice and esteem of virtue. Let him pass next to harsher language, in which he will still aim at admonition and reproof. Lastly, let him resort to punishment, yet still making it light and not irrevocable. Extreme punishment let him appoint only to extreme crime, so that no man will lose his life unless it is to the benefit even of the loser to lose it.—*Ibid.*, I. vi. 3–4.

The man who does wrong ought to be set right both by admonition and by force, by measures both gentle and harsh, and we should try to make him a better man for his own sake, as well as for the sake of others, stinting not our reproof, but our anger. . . . "But," you say, "they are incapable of being reformed, there is nothing pliable in them, nothing that gives room for fair hope." Then let them be removed from human society, if they are bound to make worse all that they touch, and let them, in the only way this is possible, cease to be evil—but let this be done without hatred. For what reason have I for hating a man to whom I am offering the greatest service when I save him from himself? . . . There is no anger there, but the pitying desire to heal. . . . For the one who administers punishment nothing is so unfitting as anger, since punishment is all the better able to work reform if it is bestowed with judgment. This is the reason Socrates says to his slave: "I would beat you if I were not angry." The slave's reproof he postponed to a more rational moment; at the time it was himself he reproved.—*Ibid.*, xv. 1–3.

"We have to be angry," you say, "in order to punish." What! Think you the law is angry with men it does not know, whom it has never seen, who it hopes will never be? The spirit of the law, therefore, we should make our own—the law which shows not anger but determination. . . . A good judge condemns wrongful deeds, but he does not hate them.—*Ibid.*, xvi. 6, 7.

He . . . who, being free from anger, imposes upon each one the punishment that he merits . . . will keep before him the knowledge that one form is designed to make the wicked better, the other to remove them; in either case he will look to the future, not to the past. For as Plato says: "A sensible person does not punish a man because he has sinned, but in order to keep him from sin; for while the past cannot be recalled, the future may be forestalled."—*Ibid.*, xix. 5, 7.

As the law pursues guilt without any hatred of persons, so the prince most justly punishes offenders from no motive of wrath but at the behest, and in accordance with the decision, of the passionless law.—John of Salisbury, *Policraticus* IV. ii.

The difference between denunciation and accusation is that in denunciation we aim at a brother's amendment, whereas in accusation we intend the punishment of his crime. Now the punishments of this life are sought, not for their own sake, because this is not the final time of retribution, but in their character of medicine, conducing either to the amendment of the sinner, or to the good of the commonwealth whose calm is ensured by the punishment of evil-doers. The former of these is intended in denunciation, as stated, whereas the second regards properly accusation. Hence in the case of a crime that conduces to the injury of the commonwealth, a man is bound to accusation, provided he can offer sufficient proof, since it is the accuser's duty to prove: as, for example, when anyone's sin conduces to the bodily or spiritual corruption of the community. If, however, the sin be not such as to affect the community, or if he cannot offer sufficient proof, a man is not bound to attempt to accuse, since no man is bound to do what he cannot duly accomplish.—St. Thomas Aquinas, II.–II, qu. 68, art. 1.

I beleave therfore that the morall vertues are not in us all together by nature, bicause nothinge can at anye time be accustomed unto it that is naturallie his contrarie: as it is seene in a stone, the whiche though it be cast upward ten thousand times, yet will he never accustome to go up of

him selfe. Therfore in case vertues were as natural to us as heavinesse to the stone, we shoulde never accustome our selves to vice. Nor yet are vices naturall in this sort, for then should we never be vertuous: and a great wickednesse and folie it were, to punishe man for the faultes that came of nature without oure offence: and this errour shoulde the lawes committ, whiche appoint not punishment to the offenders for the trespace that is past, bicause it can not be brought to passe that the thinge that is done, maye not be done, but they have a respect to the time to come, that who so hath offended maye offende no more, or elles with yll presedent give not a cause for others to offende. And thus yet they are in opinion that vertues maye be learned, whiche is most true, bicause we are borne apt to receive them, and in like maner vices: and therfore there groweth a custome in us of bothe the one and the other through longe use, so that first we practise vertue or vice, after that, we are vertuous or vitious.—Castiglione, *The Book of the Courtier* (Hoby trans., p. 304).

To this ende . . . ought to be applied the lawes, and al statutes of justice, in punishing the yll, not for malice, but bicause there should be no yll, and least they shoulde be a hinderaunce to the quiet livinge of the good.—*Ibid.* (Hoby trans., p. 318).

The rules which are common in regard to punishment . . . are: consolation for the injured party; freedom for the future from anxiety caused by the person who has been punished and by any others; and to prevent the one who has committed the fault from profiting by it.—Gentili, *De jure belli,* Book III, chap. ii.

Authority to Inflict Punishment

To reward may . . . pertain to anyone: but to punish pertains to none but the framer of the law, by whose authority the pain is inflicted. Wherefore to reward is not reckoned an effect of law, but only to punish.—St. Thomas Aquinas, I.–II, qu. 92, art. 2, ad 3.

Punishment is not simply penalty visited upon the doer of wrong, but penalty visited upon the doer of wrong by one having penal jurisdiction. Wherefore unless punishment is inflicted by a lawful judge, it is no punishment; rather must it be called a wrong.—Dante, *De monarchia* II. xiii. 2.

No one upon whom has been conferred the right to sentence an offender to death, or to any other punishment, can transfer his authority to another. —*Digest* L. xvii. 70.

Rewards and punishments are not received, but at the hands of such as being above us have power to examine and judge our deeds.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. ix. 2.

Measure of Punishment

When a man does another any injury by theft or violence, for the greater injury let him pay greater damages to the injured man, and less for the smaller injury; but in all cases, whatever the injury may have been, as much as will compensate the loss. And besides the compensation of the wrong, let a man pay a further penalty for the chastisement of his offence. . . . Not that he is punished because he did wrong, for that which is done can never be undone, but in order that in future times, he, and those who see him corrected, may utterly hate injustice, or at any rate abate much of their evil-doing. Having an eye to all these things, the law, like a good archer, should aim at the right measure of punishment, and in all cases at the deserved punishment. In the attainment of this the judge shall be a fellow-worker with the legislator, whenever the law leaves to him to determine what the offender shall suffer or pay. And the legislator, like a painter, shall give a rough sketch of the cases in which the law is to be applied.—Plato, *Laws,* XI, p. 933.

It makes no difference whether a good man has defrauded a bad man or a bad one a good one, . . . the law looks only at the degree of damage done, treating the parties as equal, and merely asking whether one has done and the other suffered injustice, whether one inflicted and the other has sustained damage. Hence the unjust being here the unequal, the judge endeavours to equalize it: inasmuch as when one man has received and the other has inflicted a blow, or one has killed and the other been killed, the line representing the suffering and doing of the deed is divided into unequal parts, but the judge endeavours to make them equal by the penalty or loss he imposes, taking away the gain.—Aristotle, *Nicomachean Ethics,* V. iv. 3–6.

We should take care . . . that the punishment shall not be out of proportion to the offence, and that some shall not be chastised for the same fault for which others are not even called to account.—Cicero, *De officiis* I. xxv. 89.

It is the duty of the judge to be careful not to impose a sentence which is either more or less severe than the case demands; for neither a reputa-

tion for harshness, or the glory of clemency should be his aim; but, having carefully weighed the circumstances of the case, we should decide whatever the matter requires.

It is clear that in cases of minor importance, judges should be inclined to lenity; and where heavier penalties are involved, while they must comply with the stern requirements of the laws, they should temper them with some degree of indulgence.—*Digest* XLVIII. xix. 11.

It is right for persons who are guilty of public wrongs to suffer penalties adapted to restrain their inclinations to injure others, and to prevent such acts from being committed. But it is not right for them to be punished with excessive severity, nor for the law to pass beyond its proper bounds, and, by a species of legal vengeance, as it were, cause injustice. For when the person who perpetrates an offence is punished, the penalty imposed upon him is just; but it ceases to be so if it is out of all proportion to the crime, and I think such a provision should not be observed.—*New Constitutions of the Emperor Leo,* Const. LXII.

Legal penalties are praiseworthy because they correct disorder and evil inclinations, and prevent persons from indulging in them by restraining them against their will. These things, I say, are praiseworthy, when he who imposes them observes that clemency which is becoming to the law, and does not exceed it, nor show himself to be cruel under the pretext of administering punishment.—*Ibid.,* Const. CV.

In order that the scales of justice may not incline more to the side of compassion than it is proper, a more serious penalty should not be imposed upon delinquents than their offences demand. For if too great commiseration is manifested by the law it would give rise to contempt, and encourage evil deeds; and if, on the other hand, a more severe penalty than is merited should be imposed, then the ends of justice will not be accomplished, and when the laws appear to do something which is equitable, they really effect what is absolutely unjust.—*Ibid.,* Const. LXVI.

There is a place for the judge's mercy in matters that are left to the judge's discretion, because in like matters a good man is slow to punish as the Philosopher states (*Ethic.* v. 10). But in matters that are determined in accordance with Divine or human laws, it is not left to him to show mercy. —St. Thomas Aquinas, II.–II, qu. 67, art. 4, ad 4.

According to the character of the persons concerned, the nature of the offence, the time, the age, the sex, punishment is made severer or more

lenient; but in such a way as to seek glory neither from clemency nor from severity.—Gentili, *De jure belli,* Book III, chap. ii.

Condemnation

We must understand a person who has been condemned to be one who has had a judgment legally rendered against him in such a way that it will stand.—*Digest* XLII. i. 4, § 6.

It would be contrary to the divine law and to natural law for a penalty to be enforced before condemnation has issued.—Vitoria, *De Indis,* Sec. I, no. 11.

Remission or Relaxation of Penalties

He who has power to condemn has also power to discharge from liability. —*Digest* XLII. i. 3.

Anyone who has the power to condemn has also the power to acquit.— *Ibid.,* L. xvii. 37.

Not every ignorant person is immune from punishment. For that ignorant person can be excused from the penalty who can not find out what he desires to learn. But they cannot be excused who, having [the means] by which they would learn, will not take pains [to do so].—Gratian, *Decretum,* Part I, dist. xxxvii, can. xvi, citing Augustine, *Questions on the Old and the New Testaments,* qu. lxvii.

If the judge were to remit punishment inordinately, he would inflict an injury on the community, for whose good it behoves ill-deeds to be punished, in order that men may avoid sin. . . . He would also inflict harm on the injured person; who is compensated by having his honour restored in the punishment of the man who has injured him.—St. Thomas Aquinas, II.–II, qu. 67, art. 4, ad 3.

The sovereign who has full authority in the commonwealth, can lawfully remit the punishment to a guilty person, provided the injured party consent to the remission, and that this do not seem detrimental to the public good.—*Ibid.,* art. 4.

Pardon brands with infamy those whom it liberates, for it does not remove the disgrace of the crime, but merely dispenses with the punishment. —*Code* IX. xliii. 3.

A rule of law that softens some penalty is no less binding than one that has fixed a penalty.—Suárez, *De legibus,* Book II, chap. xviii, § 9.

With respect to the community in general, the multitude of offenders gives rise to the occasion for a failure in executing the penalty, for the reason that it is not easy to punish a whole multitude without scandal, or without causing great disorder and greater harm to the community. Neither is it expedient to punish some, but not others, since this also would give rise to scandal through charges of favoritism. Even when punishment can, for a particular reason, be visited upon some persons, these are usually few in number, and immunity is the rule with the generality of the people.—Suárez, *De legibus,* Book VII, chap. xix, § 8.

Exile

Exile is not a punishment: it is a harbour of refuge from punishment.—Cicero, *Pro Aulius Caecina* xxxiv. 100.

What is an exile? In itself the name implies misfortune, not disgrace.—Cicero, *De domo sua* xxvii. 72.

Jurisdiction

Lawmaking is an act of jurisdiction and of superior power.—Suárez, *De legibus,* Book I, chap. v, § 15.

A law enacted [by an agent] without jurisdiction is null.—*Ibid.,* chap. ix, § 15.

Without jurisdiction there is no just coercion.—Suárez, *De mediis,* sec. II, no. 2.

The assertion made by some writers, that sovereign kings have the power of avenging injuries done in any part of the world, is entirely false, and throws into confusion all the orderly distinction of jurisdiction.—Suárez, *De bello,* sec. IV, no. 3.

Every perfect community is a true political body, governed by means of its own jurisdiction, which has a coercive force that is legislative.—Suárez, *De legibus,* Book I, chap. vi, § 21.

Sovereign power . . . depends on the mode of jurisdiction exercised by each particular prince, or state; and it is the mark of supreme jurisdiction when, under such a prince or such a state, there exists a tribunal before which all cases of litigation in that realm are decided, and from which there is no appeal to any superior tribunal.

But when there is room for an appeal, that is the mark of an imperfect state, since an appeal is the act of an inferior towards a superior.—Suárez, *De bello,* sec. II, no. 4.

If there were two sovereign princes who were unbelievers, and one of them worshipped the true God as known by the light of nature, while the other prince was an idolater some of whose subjects worshipped the true God, the latter prince could not, on the ground of his idolatry, be deprived by the former of his jurisdiction over such subjects; since the prince who worshipped the true God would have no jurisdiction over the other, and since the idolatrous prince would not lose his jurisdiction over the subjects in question owing to the mere fact of his idolatry. There is, then, an indication from natural law that this order must be preserved, because that preservation is expedient to the welfare and peace of the world and to a just equity.—Suárez, *De mediis,* sec. V, no. 5.

The . . . common opinion of theologians is that unbelievers who are not apostates, whether subjects or not, may not be coerced to embrace the faith, even after it has been sufficiently proposed to them.—*Ibid.,* sec. III, no. 4.

The true and certain opinion is that . . . unbelievers who are not subjects cannot normally be forced even to change their errors and their rites.—*Ibid.,* sec. IV, no. 3.

The word "power" has several meanings: with reference to magistrates, it signifies jurisdiction; with reference to children, it signifies paternal control; with reference to slaves, it signifies the authority of a master.—*Digest* L. xvi. 215.

Every jurisdiction exists prior to its judge, since the judge is ordained for the jurisdiction, and not conversely.—Dante, *De monarchia* III. x. 4.

A judge who administers justice beyond his jurisdiction may be disobeyed with impunity.[30] The same rule applies if he wishes to dispense justice where the amount is beyond his jurisdiction.—*Digest* II. i. 20.

It is evident that anyone to whom jurisdiction has been delegated cannot delegate the same to another.—*Ibid.,* I. xxi. 5.

It was established by the custom of our ancestors that he only can delegate jurisdiction who possesses it in his own right, and not through delegation by another.—*Ibid.,* II. i. 5.

[30] An almost identical statement appears in the canon law (*Decretals, Sext,* Book I, tit. ii, chap. ii).

He to whom jurisdiction has been delegated possesses none peculiar to himself, but must only exercise that of the magistrate who conferred it upon him; for while it is true that by the custom of our ancestors jurisdiction can be transferred, the authority conferred by law cannot be transferred.—*Digest* I. xxi. 1, § 1.

He to whom legal jurisdiction is given is also held to be invested with all the powers necessary for its exercise.—*Ibid.*, II. i. 2.

Another principle of both [canon and civil] law [is that] . . . when jurisdiction is granted, everything morally necessary for the exercise thereof is granted as well, because otherwise the grant would be minimized and inefficacious.—Suárez, *De mediis,* sec. I, no. 4.

Equality

Equality, which knitteth friends to friends,
Cities to cities, allies unto allies.
Nature gave men the law of equal rights,
And the less, ever marshalled foe against
The greater, ushers in the dawn of hate.
—Euripides, *The Phoenician Maidens,* lines 536–40.

Ye know, friends, that the sceptre of Polycrates, and all his power, has passed into my hands, and if I choose I may rule over you. But what I condemn in another I will, if I may, avoid myself. I never approved the ambition of Polycrates to lord it over men as good as himself, nor looked with favour on any of those who have done the like. Now therefore, since he has fulfilled his destiny, I lay down my office, and proclaim equal rights. [Speech of Maeandrius upon receiving tidings of the death of Polycrates, tyrant of Samos.]—*The History of Herodotus,* Book III, chap. 142.

We all spring from the same source, have the same origin; no man is more noble than another except in so far as the nature of one man is more upright and more capable of good actions. . . . Heaven is the one parent of us all, whether from his earliest origin each one arrives at his present degree by an illustrious or obscure line of ancestors.—Seneca, *De beneficiis* III. xxviii.

We and our citizens . . . do not think it right to be one another's masters or servants; but the natural equality of birth compels us to seek for legal equality, and to recognize no superiority except in the reputation of virtue and wisdom.—Plato, *Menexenus,* p. 239.

Natural law of itself declares that there is a certain equality and justice—as it were to return a deposit—or, because no wrong is done to you, you do no wrong to another. . . . That which is, in . . . [this] way, equal and absolutely just, is called natural law; that is, it is of natural right.—Vitoria, *De jure gentium et naturali*.[31]

That right is a natural right, which, from its very nature, as it were, balances the right of another.—*Ibid.*

Where men are alike and equal, it is neither expedient nor just that one man should be lord of all, whether there are laws, or whether there are no laws.—Aristotle, *Politics,* III. xvii. 1–2.

Everywhere inequality is a cause of revolution, . . . and always it is the desire of equality which rises in rebellion.—*Ibid.,* V. i. 11.

Social Justice . . . consists chiefly in equality; for fellow-citizens are partners in common, and accept a fundamental parity though their characters differ.—Aristotle, *Magna moralia* I. xxxiii. 15–16.

Broadly speaking, social Justice may be defined as equality. Injustice is inequality.—*Ibid.,* 4.

For example, when men apportion to themselves the larger share of good things and the less share of evil things, this is unequal, and we say that Injustice is done and suffered. Since, therefore, Injustice is found in unequal conditions, the Rule and Virtue of Justice are both manifested when our dealings are on equal terms. Clearly, therefore, the virtue of Justice is a mean betwixt excess and defect, much and little. By doing Injustice the unjust man receives more; through suffering Injustice the wronged man receives less. The mean state betwixt this more and less is Justice; and such a mean is equality. Equality, therefore, which avoids alike the more and the less, will be Justice, and the just man, he who desires to share equally with his neighbour; such equality implying at least two terms. So that equality with another is Justice, and the man who is satisfied with it is just.—*Ibid.,* 4–7.

Seeing, then, that the principle of Justice is an equality, it is the proportionate kind of equality that will be Justice. Now proportion requires at least four terms, being an equality between the two ratios A to B and C to D. It is proportionate, for example, that one who has large possessions

[31] Trans. in J. B. Scott, *The Spanish Origin of International Law,* Part I, p. cxi.

should pay a large amount in taxes, whilst he who possesses little pays little; and likewise that one who has toiled much should receive much, whilst he who has toiled little also receives little. The ratio of the labours should equal the ratio of the receipts, and the ratios of labour to receipt equal one another.—Aristotle, *Magna Moralia* I. xxxiii. 9.

As for the customs of the Indians which are peculiar to them, a man may consider one which was drawn up by their ancient wise men to be the most worthy of admiration; for the law has ordained that under no circumstances shall anyone among them be a slave, but that all shall be free and respect the principle of equality in all persons. For those, they think, who have learned neither to domineer over others nor to subject themselves to others will enjoy a manner of life best suited to all circumstances; since it is silly to make laws on the basis of equality for all persons, and yet to establish inequalities in social intercourse.—Diodorus Siculus, Book II. 39. 5.

A man's work is said to be just when it is related to some other by way of some kind of equality, for instance the payment of the wage due for a service rendered.—St. Thomas Aquinas, II.–II, qu. 57, art. 1.

Friendship on a footing of equality is civic friendship.—Aristotle, *Eudemian Ethics,* VII. x. 14.

Since law is the bond which unites the civic association, and the justice enforced by law is the same for all, by what justice can an association of citizens be held together when there is no equality among the citizens? For if we cannot agree to equalize men's wealth, and equality of innate ability is impossible, the legal rights at least of those who are citizens of the same commonwealth ought to be equal. For what is a State except an association or partnership in justice?—Cicero, *De re publica* I. xxxii. 49.

By nature there is equality among men, not superiority. . . . For where we are not transgressors, we are equal. Although the superiority which many seek, and the subjection which many flee from, are correlative, it is not a laudable desire which leads one to endeavor to attain superiority for himself through the subjection of others, unless this is done because of a decree of God or for the benefit of the people. [Otherwise] such a desire is not natural, nor does it pertain to virtue, but to vice.—St. Thomas Aquinas, *De eruditione principum,* Book I, chap. i.

It is proper to justice, as compared with the other virtues, to direct man in his relations with others: because it denotes a kind of equality, as its very name implies; indeed we are wont to say that things are adjusted when they are made equal, for equality is in reference of one thing to some other. —St. Thomas Aquinas, II.–II, qu. 57, art. 1.

A law which apportions burdens unequally will be unjust, even if the thing which it prescribes is not inequitable.—Suárez, *De legibus,* Book I, chap. ix, § 13.

In many parts of our law the condition of women is worse than that of men.—*Digest* I. v. 9.

So far as the Civil Law is concerned, slaves are not considered persons, but this is not the case according to natural law, because natural law regards all men as equal.—*Ibid.,* L. xvii. 32.

Ownership and dominion are based either on natural or on human law; therefore they are not destroyed by want of faith. . . . it is not justifiable to take anything that they possess from either Saracens or Jews or other unbelievers as such, that is, because they are unbelievers; but the act would be theft or robbery no less than if it were done to Christians.—Vitoria, *De Indis,* Sec. I, no. 7.

Christian princes—whether they be secular, or lords of the Church—may not deprive infidels of this [public] power and sovereignty merely on the ground that they are infidels, when no injury has been done by them.—Vitoria, *De potestate civili,* no. 9.

Privilege

Even though its proximate subject-matter may be the private good of a particular family or household, or that of particular individuals . . . nevertheless, from a formal standpoint, [a privilege] should look also to the common good.—Suárez, *De legibus,* Book I, chap. vii, § 12.

For the good conceded by the privilege should be a private good [only] in such a way as to redound to the common welfare.—*Ibid.*

In so far as relates to the common good, it is not unreasonable that a privilege should have the character of law.—*Ibid.*

No one has the power to confer a privilege which is prejudicial to the rights of the human race.—Grotius, *Mare liberum,* chap. vii.

Liberty

Liberty is a possession of inestimable value.—*Digest* L. xvii. 106.

The human race is ordered for the best when it is most free.—Dante, *De monarchia* I. vii. 1.

All morality depends upon liberty.—Suárez, *De legibus,* Book II, chap. ii, § 11.

According to natural law all persons were born free.—*Digest* I. i. 4.

Freedom (from which is derived the designation free) is the natural right enjoyed by each one to do as he pleases, unless prevented by force or by law.—*Institutes* I. iii. 1.

True liberty ought not to be saide to live as a manne will, but to lyve accordynge to good lawes.—Castiglione, *The Courtier* (Hoby trans., pp. 312–13).

Nature, although it has granted liberty and dominion over that liberty, has nevertheless not absolutely forbidden that it should be taken away.—Suárez, *De legibus,* Book II, chap. xiv, § 18.

Liberty is natural to man, since he possesses it by virtue of natural law; yet the law of nature does not forbid the loss of his liberty.—*Ibid.,* § 6.

Slavery is a provision of the Law of Nations by means of which one person is subjected to the authority of another, contrary to nature.—*Institutes* I. iii. 2.

I say . . . that slavery is contrary to the first intention of nature. Yet it is not contrary to the second, because natural reason has this inclination, and nature has this desire,—that everyone should be good; but from the fact that a person sins, nature has an inclination that he should be punished for his sin, and thus slavery was brought in as a punishment of sin.—St. Thomas Aquinas, *Summa,* Part III (Supplement), qu. 52, art. 1, ad 2.

Liberty, which is proper to mankind by the law of nature, . . . is nevertheless taken from men by human laws.—Suárez, *De legibus,* Book II, chap. xiv, § 2.

If . . . we are speaking of the natural law of dominion, it is then true that liberty is a matter of natural law, in a positive, not merely a negative

sense, since nature itself confers upon man the true dominion of his liberty. —*Ibid.*, § 16.

Liberty rather than slavery is a precept of the natural law, for this reason, namely, that nature has made men free in a positive sense (so to speak) with an intrinsic right to liberty, whereas it has not made them slaves in this positive sense, strictly speaking. Similarly, nature has conferred upon men in common dominion over all things, and consequently has given to every man a power to use these things; but nature has not so conferred private property rights in connexion with that dominion.—*Ibid.*

There is in truth an old-standing discussion among philosophers, whether this division of persons into freemen and slaves is a feature of our society which is of natural origin, or of human institution: Aristotle's view was that it was of natural origin, but our jurists affirm that slavery is against nature and belongs to the law of nations (*jus gentium*), seeing that by natural law all were born free in the beginning and that by nature all men are equal, a proposition which is approved also by Cicero, for (says he) no two things are so identical, so similar to one another, as we men are to each other. The doctrine of the jurists is not, however, free from difficulty, because the law of nature is immutable and the *jus gentium* can not derogate from it. Moreover, it seems unjust and repugnant to nature for men to be slaves to men, though possibly expedient in the interests of the State, an argument on which some ancient thinkers relied very much in days gone by when attempting to defend the commonly stated proposition that a State can either exist nor develop without injustice. . . .

Note also, as aiding in the solution of the problem, that liberty is an institution of the law of nature, in that before the development of the *jus gentium* all men were born free and were reckoned each other's peers and equals—not, however, that the law of nature has any precept on the subject or that it forbids slavery. But the *jus gentium,* which has its basis in natural reason, introduced war and slavery. For, as man's wickedness increased, right natural reason—and there is nothing diviner than it; it is in virtue of it that we are superior to the beasts—taught that this wickedness of man ought to be restrained by war and captivity and slavery.

In the same way, under the law of nature, in that primitive time which pagans used to call the Golden Age, all things were in common and nothing belonged to any individual, but in following ages it was found that community of goods was not adapted to man's debased nature and so the *jus gentium,* under the guidance of natural reason, developed the system of

private ownership and all the differences incidental to it. Community of goods, therefore, equality of men, one and the same freedom for all—these suit the blameless primitive time and Plato's ideal republic far better than they suit the iron age. They are therefore condemned by the *jus gentium*. Slavery, then, was unknown to the law natural—according to which all men were born free and reckoned each other's peers and equals; yet it was left open to the *jus gentium* to develop slavery and to introduce the doctrine that prisoners captured in a just war become slaves—and this all the more so because of its utility to the State as a means of repressing those who wage unjust war. That same reason, accordingly, which permits war enjoined the introduction of slavery.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. v, § 16.

I have no hesitation in saying that the condition of slavery is a just one. For it is a provision of the law of nations. But the objection is made, that natural reason, which is the basis of the law of nations, could not introduce slavery if we are all free by nature; therefore slavery is said to be contrary to nature and to owe its origin to the cruelty of the enemy. But there are many answers to this objection. I agree with Thomas Aquinas [Part III (Supplement), qu. 52, art. 1][32] that slavery is really in harmony with nature; not indeed according to her first intent, by which we were all created free, but according to a second desire of hers, that sinners should be punished.—Gentili, *De jure belli,* Book III, chap. ix.

Liberty has no dwelling-place in any State except that in which the people's power is the greatest, and surely nothing can be sweeter than liberty; but if it is not the same for all, it does not deserve the name of liberty.—Cicero, *De re publica* I. xxxi. 47.

Let the laws be never so much overborne by some one individual's power, let the spirit of freedom be never so intimidated, still sooner or later they assert themselves either through unvoiced public sentiment, or through secret ballots disposing of some high office of state. Freedom suppressed and again regained bites with keener fangs than freedom never endangered.—Cicero, *De officiis* II. vii. 24.

Then M. Peter Bembo: And me thinke (quoth he) that sins [since] God hath given us libertie for a soveraigne gifte, it is not reason that it should be taken from us: nor that one man should be partner of it more than

[32] See *supra,* under the present rubric.

an other, which happeneth under the rule of princis, who for the most part keepe their people in most streict bondage. But in Commune weales well in order this libertie is well kept. Beeside that, both in judgementes and in advisementes it happeneth oftner that the opinion of one alone is false, then the opinion of many, bicause troublous affection either through anger, or throughe spite, or through lust, sooner entreth into the mind of one alone then into the multitudes, whiche (in a maner) like a greate quantitie of water, is lesse subject to corruption, then a smalle deale.—Castiglione, *The Courtier* (Hoby trans., p. 311).

The liberty in which we were created does not conflict with political subjection, but with despotic, that is, with true and real slavery; but political subjection differs from servile, because one who is subject as a slave exists and works for another as his end; he who is subject politically exists and works for his own advantage. A slave is governed not in view of what is to his own advantage, but of what is to the advantage of his master; a citizen is governed in view of what is to his own advantage, not of what is to the advantage of the magistrates, just as, on the other hand, a political ruler, while he is governing the people, seeks not his own advantage, but that of the people. But a tyrannous lord seeks his own advantage, not that of the people, as Aristotle teaches [*Ethics,* Book VIII, chap. x]. And so, truly, if there is any slavery in political government, he who commands should more rightfully be called a slave than he who is subject.—Bellarmine, *De laicis* vii (Murphy trans., pp. 33–4).

Agreements and Contracts

It is to be understood, that contracts be grounded upon a custom of the realm, and by the law that is called *Ius gentium,* and not directly by the law of reason: for when all things were in common, it needed not to have contracts, but after property was brought in, they were right expedient to all people, so that a man might have of his neighbor that he had not of his own; and that could not be lawfully but by his gift, by way of lending, concord, or by some lease, bargain, or sale; and such bargains and sales be called contracts, and be made by assent of the parties upon agreement between them, of goods or lands, for money, or for other recompence.—St. Germain, *Doctor and Student* (16th ed.), p. 176.

An agreement is the consent of two or more persons to the same effect.—*Digest* II. xiv. 1, § 2.

An agreement arises from the consent of two persons, in the same manner as a contract. A promise, however, only requires the consent of the individual making the offer.—*Digest* L. xii. 3.

The term *pactum* is derived from *pactio*, and the word *pax* has also the same origin.—*Ibid.*, II. xiv. 1, § 1.

Pactum (an agreement) is what is agreed upon among certain persons.—St. Augustine, *On Eighty-Three Different Questions*, XXXI. 1.

Pactum (a pact) is called writing between parties, appropriate from the point of view of peace, confirmed by laws and customs.—Isidore, *Etymologies*, Book V, chap. xxiv, § 18.

The term *"conventio"* is a general one, and refers to everything to which persons who have transactions with one another give their consent for the purpose of making a contract, or settling a dispute; for as parties are said to come together who assemble from different places in one; so, also, the same word is applicable to those who, from different feelings of the mind, agree upon one thing; that is to say, arrive at one opinion. The term *"conventio"* is such a general one, as Pedius very properly says, that there is no contract and no obligation which does not include it, whether it is made by the delivery of the property, or verbally; for even a stipulation, which is verbally made, is void, where consent does not exist.

The greater number of conventions have names that are peculiar to them, as, for instance, sale, hire, pledge, and stipulation.—*Digest* II. xiv. i, § § 3-4.

In agreements, the intention of the contracting parties should rather be considered than the terms of the stipulation.—*Ibid.*, L. xvi. 219.

Where anyone makes use of ambiguous language, or his intention is doubtful, he must be understood in the sense which is most favorable to himself.—*Ibid.*, V. i. 66.

As in the beginning everyone has free power to make or not to make contracts, so where an obligation has once been entered into neither party can, without the consent of his adversary, reject it. Wherefore you should understand that when you have once been bound by a voluntary agreement, you can, under no circumstances, repudiate it, without the consent of the other party.—*Code* IV. x. 5.

When a man makes an agreement which he does not fulfil, unless the agreement be of a nature which the law or a vote of the assembly does not

allow, or which he has made under the influence of some unjust compulsion, or which he is prevented from fulfilling against his will by some unexpected chance, the other party may go to law with him in the courts of the tribes, for not having completed his agreement, if the parties are not able previously to come to terms before arbiters or before their neighbours.—Plato, *Laws,* XI, p. 920.

If a breach of faith occur with regard to some matter in contemplation of which the contract was entered into, the whole agreement falls to the ground and everything goes back into its original position.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. vi, § 17.

We can make agreements and settlements with reference to matters in litigation.—*The Opinions of Julius Paulus,* I. i. 5.

The agreement of private individuals does not affect public law.—*Digest* L. xvii. 45, § 1.

Public law cannot be changed by the contracts of private persons.—*Ibid.,* II. xiv. 38.

We can enter into agreements with reference to matters which are lawful, and from them alone the obligation of a contract arises.—*The Opinions of Julius Paulus,* I. i. 1.

Generally speaking, whenever an agreement is contrary to the Common Law, one is not obliged to observe it, . . . and where a stipulation has been entered into with reference to matters which it is not lawful to make the subject of a contract it is not to be observed, but entirely rescinded.—*Digest* II. xiv. 16.

Agreements entered into against the Civil Law are not considered valid.—*Ibid.,* 28.

No one can benefit another to the detriment of a third party, either by an agreement, by prescribing a condition, or by entering into a stipulation.—*Ibid.,* L. xvii. 73, § 4.

It is a well-known rule of law that a compromise made between certain parties cannot prejudice the rights of another who is absent.—*Code* VII. lx. 2.

A stipulation entered into concerning a crime which has been or is to be committed, is void from the beginning.—*Digest* XLV. i. 123.

We cannot make a contract which is contrary to the laws or to good morals.—*The Opinions of Julius Paulus,* I. i. 4.

Agreements which contain immoral provisions should not be observed. . . . And, above all things, it must be borne in mind that an agreement made with reference to one thing or to one person, shall not injure another thing or another person.—*Digest* II. xiv. 27, § 4.

Generally speaking, dishonorable stipulations are of no force or effect.—*Ibid.,* XLV. i. 26.

If I stipulate for an act to be performed which Nature does not permit to take place, the obligation does not become operative, any more than when I stipulate that something shall be given which is not possible, unless it is the fault of some one that this cannot be done.—*Ibid.,* 35.

Whatever is impossible cannot be included in an agreement or a stipulation in such a way as to create an equitable action or basis of action.—*Ibid.,* L. xvii. 31.

If we stipulate that something shall be given to us which cannot be transferred, the stipulation is void. . . .

Likewise, if anyone stipulates for something which cannot, in the nature of things, exist, as for instance, a hippocentaur, such a stipulation is void.

Moreover, if anyone stipulates under a condition which cannot take place, for example, if he should touch the sky with his finger, the stipulation is void.—*Institutes of Gaius,* Third Commentary, 97, 97a, 98.

Not only stipulations, but also any other contracts which have been made under impossible conditions are considered to be of no force or effect; . . . because when an agreement is made between two or more persons the intention of all of them is taken in account, and there is no doubt that they think a contract of this kind cannot be executed, if a condition is imposed which they know to be impossible.—*Digest* XLIV. vii. 31.

It cannot be provided by agreement that a person shall not be responsible for bad faith.—*Ibid.,* II. xiv. 27, § 3.

Nothing is so opposed to consent, which is the basis of *bona fide* contracts, as force and fear; and to approve anything of this kind is contrary to good morals.—*Ibid.,* L. xvii. 116.

Those agreements which are extorted by a usurping force need not be respected; for consent, which is a necessary element in all contracts, is want-

ing in acts which have been procured by violence; transactions entered into in such circumstances are therefore void. . . . Nor can there be any obligation which rests on the pleasure of the promisor.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. vi, §§ 8, 9.

Until the one party in whose name the agreement was made ratifies it, the other party is under no obligation, in order that the conditions may be equal for both.—Gentili, *De jure belli,* Book III, chap. xxiii.

An important contract should not be annulled because of an insignificant matter. Trivial things are always happening, simply because they are trivial, and therefore all contracts would be most unstable, if it were lawful to withdraw from them on account of some trivial and unimportant matter. The justice of the law of nations does not allow this.—*Ibid.,* Book III, chap. xxiv.

The whole of an agreement is invalidated by failure to keep a part of it, because all the chapters of a contract are regarded as connected, and one agreement is made with reference to another. All contracts are indivisible,[33] or at any rate those which do not relate to giving, which is divisible, but to doing, which is indivisible. And every contract is indivisible, because it ought not to be fulfilled in part and neglected in part.—*Ibid.*

Philosophers teach that a fair price is not a fixed point, but may vary somewhat. Do I say, "the philosophers"? All the jurists and all theologians hold the same view. The theologians give this further warning that one should not look back or wait in the hope of securing more than a fair gain in the future.—Gentili, *Hispanicae advocationis,* Book II, chap. xxii.

Good Faith

It is not natural for good men to go to law, and these men make their contracts as good men and as dealing with trustworthy people.—Aristotle, *Eudemian Ethics,* VII. x. 19.

In his relations to strangers, a man should consider that a contract is a most holy thing.—Plato, *Laws,* V, p. 729.

The foundation of justice . . . is good faith—that is, truth and fidelity to promises and agreements.—Cicero, *De officiis* I. vii. 23.

[33] This doctrine of the indivisibility of contracts, is, of course, not in harmony with modern theory and practice.

Faith is the foundation of justice.—Gentili, *De jure belli,* Book II, chap. iii.

Where there is not sound faith, there cannot be justice, because the just man lives by faith. . . . likewise, where there is no charity, there can be no justice. For the love of a neighbor does not work evil.—Gratian, *Decretum,* Part II, cau. xxiv, qu. i, can. xix, citing Augustine, *On the Sermon of Our Lord on the Mount,* Book I, chap. v, no. 13.

Where there is no charity, there faith or justice have no place.—*Ibid.,* Part II, cau. xxiv, qu. i, can. xix.

They of olden time always held that there was no grander or more sacred matter in human life than good faith.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. vi, § 1.

What is so suitable to the good faith of mankind as to observe those things which parties have agreed upon?—*Digest* II. xiv. 1.

For faith, when it is promised, must be kept even with an enemy against whom war is waged.—Gratian, *Decretum,* Part II, cau. xxiii, qu. i, can. iii, citing Augustine, *Letters,* clxxxix, no. 4.

Faith need not be kept, not even when accompanied by an oath, with an enemy who breaks faith.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. vi, § 17.

It is not obligatory to keep faith, or even one's oaths, with pirates and brigands, for such men are not included in the number of the enemy. There is no faith with them, no oath in common.—Gentili, *De jure belli,* Book II, chap. iii.

Honesty demands that a man should keep any promise he makes to another man, and this obligation is based on the natural law.—St. Thomas Aquinas, II.–II, qu. 88, art. 3, ad 1.

The law relative to observing a promise and keeping faith with God and men is a natural precept.—Suárez, *De legibus,* Book II, chap. xvii, § 9.

In the case of any contract or commercial agreement . . . the observance of the contract after it has been made . . . pertains to the natural law.—*Ibid.,* chap. xix, § 7.

Both the power to contract a treaty or convention, and the obligation arising from that treaty or convention and demanding good faith and justice, have regard to the law of nature.—*Ibid.*, chap. xviii, § 7.

In taking an oath it is our duty to consider not what one may have to fear in case of violation but wherein its obligation lies: an oath is an assurance backed by religious sanctity; and a solemn promise given, as before God as one's witness, is to be sacredly kept. For the question no longer concerns the wrath of the gods (for there is no such thing) but the obligations of justice and good faith. For, as Ennius says so admirably:

> Gracious Good Faith, on wings upborne;
> thou oath in Jupiter's great name!
>
> —Cicero, *De officiis* III. xxix. 104.

Good faith, which is required in contracts, demands the greatest degree of equity.—*Ibid.*, XVI. iii. 31.

It is with good reason held that no less authority attaches to compromise than to matters which have been judicially decided; and, indeed, nothing is so agreeable to the good faith of human nature as for men to abide by the agreements which they have entered into.—*Code* II. iv. 20.

It is no more than just for good faith to be taken into consideration in all contracts.—*Ibid.*, IV. x. 4.

It is part of the general law of contract that no one is bound by a contract unless the other party performs what he has undertaken, it being futile for one who refuses to keep faith with another to claim that that other shall keep faith with him. It is knavish to insist that a given principle applies as against the other side, but not as against oneself.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. vi, § 17.

There is implied in every oath a condition such as, "Provided that good faith be kept with me," or as, "Save so far as the other party is responsible for the non-performance of this agreement." If this latter clause is called into operation, a tacit release of the agreement is assumed to occur, and the first to contravene the agreement is alone taken to have broken faith, so that the consequential act of the other party cannot be reckoned a violation of his oath.—*Ibid.*

We desire that matters which have been transacted by public authority shall remain forever valid, as the public faith should not pass away with the death of the official having jurisdiction.—*Code* VII. lii. 6.

The statutes of princes are not to be overthrown by a clever interpretation. Cunning, unjust and knavish interpretations and tricks of the crafty law are banished even from the affairs of private individuals. How much the more then should they be expelled from those of the public?

In agreements in good faith and deserving of favor all fine points of the law are disdained, since they have nothing to do with good faith and by excess of subtlety they subvert the good faith of those who make the agreements. Verbal snares are far removed from the truth.—Gentili, *De jure belli,* Book II, chap. iv.

In private affairs, one who had carried out a trust—I do not say fraudulently for his own profit or advantage, but even somewhat carelessly—was thought by our ancestors to have behaved in a most dishonorable manner. Accordingly, an action for breach of trust was established, the result of which involved as much disgrace as an action for theft. I suppose the reason for this was that, in matters in which we ourselves are unable to take a personal part, the promise of our friends is substituted for our own exertions; and one who violates this promise attacks what is the common safeguard of all, and, as far as it is in his power, ruins all social life. For we cannot do everything by ourselves; each has his part to play, in which he can be more useful than others. That is why friendships are formed—that the common interest may be furthered by mutual services. Why accept a trust, if you intend to neglect it or turn it to your own advantage? . . .

That is why one who does not carry out a trust is guilty of a disgraceful fault, because he violates two things that are most sacred—friendship and good faith. For as a rule no one entrusts a commission to anyone but a friend, and only trusts one whom he believes to be faithful. It is therefore the act of an utterly abandoned man to destroy friendship and at the same time to deceive one who would not have suffered injury unless he had trusted him. Is it not so?—Cicero, *Pro Sexto Roscio Amerino* xxxviii–xxxix. 111–13.

Would that I could persuade the lenders of money to accept payment only from those who are willing to pay! Would that no compact marked the obligation of buyer to seller, and that no covenants and agreements were safeguarded by the impress of seals, but that, instead, the keeping of them were left to good faith and a conscience that cherishes justice! But men have preferred what is necessary to what is best, and would rather compel good faith than expect it. Witnesses are summoned on both sides. One creditor, by having recourse to factors, causes the record to be made in the

books of several people; another is not content with oral promises, but must also bind his victim by a written signature. O, what a shameful admission of the dishonesty and wickedness of the human race! More trust is placed in our seal-rings than in our consciences.—Seneca, *De beneficiis* III. xv. 1–3.

Just as the right of defense ought not to be denied to those who have been injured, so the way ought not to be opened to bad faith.—Gentili, *Hispanicae advocationis,* Book II, chap. viii.

Obligations

An obligation is a certain moral impulse to action.—Suárez, *De legibus,* Book II, chap. vi, § 22.

Obligation is the essence or proper characteristic of law.—Bellarmine, *De laicis* xi (Murphy trans., p. 46).

Every obligation either arises from a contract or from an offence.—*Institutes of Gaius,* Third Commentary, 88.

An obligation is a bond of law by which we are reduced to the necessity of paying something in compliance with the laws of our state. The principal division of all obligations resolves itself into two classes; for they are either civil or praetorian. Civil obligations are such as are created by statute, or at all events are approved by the Civil Law. Praetorian obligations are such as the Praetor has established by virtue of his jurisdiction, and these are also styled honorary.

Another division is made into four classes, for they arise either from contract, quasi-contract, an illegal act, or a quasi-illegal act.—*Institutes* III. xiii.

There are four different kinds of obligations, for they are contracted with reference to a certain time, or under a certain condition, or with reference to a certain measure, or dependent upon certain results.—*Digest* XLIV. vii. 44.

An "obligation," properly speaking, is something which we are obliged to do according to law, custom, or the command of someone who has the right to order it to be done.—*Ibid.,* L. xvi. 214.

No obligation is binding which is impossible.—*Ibid.,* xvii. 185.

Obligations which are not valid themselves cannot be rendered so either by the decision of the judge, the order of the praetor, or the power of the law.—*Ibid.,* XLIV. vii. 27.

It ought to be noted that an oath has these things associated with it: truth, comprehension, and justice. If they are wanting, it will in no wise be an oath, but perjury.—Gratian, *Decretum,* Part II, cau. xxii, qu. ii, can. ii, citing Jerome, *On Jeremiah,* Book I, on chap. iv.

An oath . . . is void which is antagonistic to statutes and to the authority of the law.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. vi, § 15.

An oath which is without agreement is without spirit. When agreement is lacking, so also is the law of nature. Every falsehood is a sin according to natural law! therefore an oath does not help matters. For example, why should an oath give authority to injustice and aid deceivers? An oath is understood *rebus sic stantibus,* and just as it cannot undo an action that has taken place, so it cannot cause an act to have taken place which did not occur or was not even thought of.—Gentili, *De jure belli,* Book II, chap. v.

Where a person, overcome maybe by a weakness to which all are liable, has sworn to do something offensive to God, by whom he has sworn: he must not fulfill his oath, for an oath should not be a bond of iniquity, nor is it expedient to keep faith in wrongful promises, nor is there any bindingness in an oath, the taking of which violates good morals. Nay, he who does what is forbidden, simply because he has sworn to do it, adds one sin to another.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. vi, § 14.

A surety can be added to every obligation.—*Digest* XLVI. i. 1.

There is a mutuality in an obligation whereby each party is so bound as that either is released on his side if the other fails to perform what he has undertaken.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. vi, § 17.

That faith may be broken with one who breaks faith, even though he be your master, and whether the pledge was made under oath or without an oath, is the opinion of the people, of justice, and of the law.—Gentili, *De jure belli,* Book III, chap. xxiv.

With one who breaks faith it is surely just to break faith in the same affair, and in corresponding affairs; but this is not allowed in affairs of a different kind.—*Ibid.*

Fraud

To do what the law prohibits violates the law, and anyone who evades the meaning of the law without disobeying its words, is guilty of fraud against it.—*Digest* I. iii. 29.

Fraud is committed against the law when something is done which the law did not wish to be done, but did not absolutely prohibit; and the difference between fraud against the law and violation of the same is that between speech and opinion.—*Ibid.*, 30.

Labeo . . . gives a definition of fraudulent intent as being: "An artifice, deception, or machination, employed for the purpose of circumventing, duping, or cheating, another." The definition of Labeo is the correct one.—*Ibid.*, IV. iii. 1, § 2.

There is no doubt that he violates the law who, while obeying its letter attempts to destroy its spirit. . . . He will not escape the legal penalties prescribed, if, contrary to the intention of the law, he frequently and fraudulently takes advantage of its words.—*Code* I. xiii. 5.

The establishment of the existence of fraud, according to the Civil Law, does not always depend upon the event, but whether there was an intention to commit it.—*Digest* L. xvii. 79.

No one is considered to defraud those who are aware of the facts, and give their consent.—*Ibid.*, 145.

Fraud is more shameful than violence, since it attacks under the ambuscade of a just proposal.—Gentili, *De jure belli,* Book III, chap. xiv.

Again, he who swears something false, lies. But to swear to a lie is nothing else than to commit perjury.—Gratian, *Decretum,* Part II, cau. xxii, qu. ii, can. ii.

He commits perjury who would do otherwise than he promised.—*Ibid.*

Perfidy (I now say) destroys all trust, even with those who are not treacherous.—Gentili, *De jure belli,* Book III, chap. xxiv.

Injury

An injury, generally speaking, means everything that is done contrary to law, and particularly it sometimes signifies outrage, which is derived from the word *contemnere,* and is styled by the Greeks ὕβρις, at other times

gross negligence which the Greeks designate ἀδίκημα, and in this way "unlawful damage" is understood in the *Lex Aquilia;* and then again it denotes unfairness and injustice which the Greeks call ἀδικία, for when a Praetor or a Judge renders a decision against anyone contrary to law the latter is said to have sustained an injury.—*Institutes* IV. iv.

Something done contrary to law is designated an injury, for everything which is illegal is held to be injurious. This, generally speaking, is the case, but, specifically, an injury is defined to be an insult. Sometimes, by the term "injury" damage caused by negligence is meant, as we are accustomed to state in the Aquilian Law. At other times, we call injustice an injury, as where anyone has rendered a wrongful or inequitable decision, and this is styled an injury because it is in violation of law and justice as not being legal.—*Digest* XLVII. x. 1.

Accessories to Crime

He who does not set right crimes which he can correct, commits them himself.—Gratian, *Decretum,* Part II, cau. xxiii, qu. viii, can. xii.

[A man] is an accessory . . . if he commits anything evil with [other persons], or favors them committing it. But if he does neither, he is in no way accessory.—*Ibid.,* qu. iv, can. vi, citing Augustine, *Against Parmenianus,* Book II, chap. i.

He commits a wrong who orders it to be committed. He, however, is not to blame who is compelled to obey.—*Digest* L. xvii. 169.

The ratification of the commission of an offence resembles an order to commit it.—*Ibid.,* 152, § 2.

Property

The best way were, to have the greater part of the Citizins, neyther verye wealthie, nor verye poore: bicause the over wealthy many times were stiff necked and recklesse, the poore, desperate and pikinge.—Castiglione, *The Courtier* (Hoby trans., p. 324).

Corporeal property is such as by its nature is tangible; as, for instance, land, a slave, clothing, gold, silver, and in short, innumerable other things.

Incorporeal property is that which cannot be touched, and is such as consists of rights; for instance, an inheritance, an usufruct, or obligations contracted in any way.—*Institutes* II. ii. 1, 2.

Ius and Property

According to the . . . strict acceptance of *ius,* this name is properly wont to be bestowed upon a certain moral power which every man has, either over his own property or with respect to that which is due to him.—Suárez, *De legibus,* Book I, chap. ii, § 5.

This acceptation of the term is frequent . . . for the law distinguishes in this wise between a right (*ius*) already established *in* a thing and a right *to* a thing; as it also distinguishes among rights (*iura*) of servitude or rights of rural or urban estates, rights of use or enjoyment, and similar rights.—*Ibid.*

This right to claim (*actio*), or moral power, which every man possesses with respect to his own property or with respect to a thing which in some way pertains to him, is called *ius,* and appears to be the true object of justice.—*Ibid.*

Public and Private Property

Those things that are under human law are either public or private. Those which are public are held to be the property of no one, and are considered to belong to the entire community, and those which are private belong to individuals.—*Digest* I. viii. 1.

Some things are by natural law common to all persons, some are public, some belong to a corporate body, some to no one, the greater part are the property of individuals, and these are acquired in various ways.—*Institutes* II. i. 1.

By natural law the following things belong to all men, namely: air, running water, the sea, and for this reason the shores of the sea. No one, therefore, is prohibited from approaching the seashore if he avoids damaging houses, monuments, and other structures, because they are not, like the sea, subject to the Law of Nations.—*Ibid.,* 1.

All rivers and ports are also public, and therefore the right of fishing in a harbor or in streams is common to all.—*Ibid.,* 2.

The public use of the banks of rivers is also subject to the Law of Nations, just as the use of the river itself is.—*Ibid.,* 4.

"By natural law running water and the sea are common to all, so are rivers and harbors, and by the law of nations ships from all parts may be

moored there" (Inst. II. i.); and on the same principle they are public things. Therefore it is not lawful to keep any one from them.—Vitoria, *De Indis,* Sec. III, no. 2.

As there are some things which every man enjoys in common with all other men, and as there are other things which are distinctly his and belong to no one else, just so has nature willed that some of the things which she has created for the use of mankind remain common to all, and that others through the industry and labor of each man become his own. Laws moreover were given to cover both cases so that all men might use common property without prejudice to any one else, and in respect to other things so that each man being content with what he himself owns might refrain from laying his hands on the property of others.—Grotius, *Mare liberum,* Introduction.

That which cannot be occupied, or which never has been occupied, cannot be the property of any one, because all property has arisen from occupation.—*Ibid.,* chap. v.

Public territory arises out of the occupation of nations, just as private property arises out of the occupation of individuals.—*Ibid.*

The nature of man . . . is such, that as it were a code of law subsists between the individual and the human race, so that he who upholds this code will be just and he who departs from it, unjust. But just as though the theatre is a public place it is yet correct to say that the particular seat a man has taken belongs to him, so in the state or in the universe, though these are common to all, no principle of justice militates against the possession of private property.—Cicero, *De finibus* III. xx. 67.

How splendid a thing is the law, gentlemen, and how worthy, therefore, of your protection! How may we describe it? The law is that which influence cannot bend, nor power break, nor wealth corrupt; if law be overthrown, nay, if it be neglected or insufficiently guarded, there will be nothing which anyone can be sure either of possessing himself or of inheriting from his father or of leaving to his children. What does it profit you to possess a house or an estate left to you by your father or legitimately acquired in some other way, if you are not certain of being able to keep that which the law of ownership now makes yours, if the law be inadequately safeguarded and if our public code be unable to maintain our rights

in the face of some private interest? What advantage is there, I say, in having an estate if all the rights fittingly prescribed by our forefathers in connection with boundaries, possession, water, and roads can be upset or changed on any consideration? Believe me, the property which anyone of us enjoys is to a greater degree the legacy of our law and constitution than of those who actually bequeathed it to him. For anyone can secure by his will that an estate comes into my possession; but no one can secure that I keep what has become mine without the assistance of the law. A man can inherit an estate from his father, but a good title to the estate, that is, freedom from anxiety and litigation, he inherits not from his father but from the law. Rights of water, drawn or carried, rights of way for man or beast, he derives from his father, but he derives from the law his established title to all these rights. Wherefore you ought to hold fast what you have received from your forefathers—the public heritage of Law—with no less care than the heritage of your private property; and that, not only because it is the law by which private property is hedged about, but because the individual only is affected if he abandons his inheritance, while the law cannot be abandoned without seriously affecting the community.—Cicero, *Pro Aulius Caecina* xxvi. 73–75.

Division of Common into Private Property

By the natural law all things were [originally] held in common, and nevertheless a division of property was introduced by mankind.—Suárez, *De legibus,* Book II, chap. xiv, § 2.

At the beginning all goods were in common, but after they were brought by the law of man into a certain property, so that every man might know his own: and then when such property is given by the law of man, the same law may assign such conditions upon the property as it listeth, so they be not against the law of God, ne the law of reason, and may lawfully take away that it giveth, and appoint how long the property shall continue.—St. Germain, *Doctor and Student* (16th ed.), pp. 110–11.

There is . . . no such thing as private ownership established by nature, but property becomes private either through long occupancy (as in the case of those who long ago settled in unoccupied territory) or through conquest (as in the case of those who took it in war) or by due process of law, bargain, or purchase, or by allotment. . . . Therefore, inasmuch as in each case some of those things which by nature had been common property became the property of individuals, each one should retain possession of

that which has fallen to his lot; and if anyone appropriates to himself anything beyond that, he will be violating the laws of human society.—Cicero, *De officiis* I. vii. 21.

The law of nature differs from custom and statute. For by the law of nature all things are common to all persons, a conception which is not only believed to have been observed by those of whom it is written "And the multitude of believers had but one heart and one soul" [*Acts*, chap. iv. v. 32], but which is even found to have been handed down by the philosophers from earlier ages. Whence, according to Plato, that city is reported to be the most justly ordered in which no one has learned his own desires. But by the law of custom or by statute law (*constitutionis*) this is mine, but that is some one else's.—Gratian, *Decretum*, Part I, dist. viii, par. 1.

Community of goods is ascribed to the natural law, not that the natural law dictates that all things should be possessed in common, and that nothing should be possessed as one's own: but because the division of possessions is not according to the natural law, but rather arose from human agreement which belongs to positive law, as stated above (Q. LVII., AA. 2, 3). Hence the ownership of possessions is not contrary to the natural law, but an addition thereto devised by human reason.—St. Thomas Aquinas, II.-II, qu. 66, art. 2, ad 1.

A division of property is not contrary to positive natural law; for there was no natural precept to forbid the making of such a division. Therefore, when certain legal precepts are said to be opposed to the law of nature, they are to be thought of, in their negative relationship to natural law; for ownership in common was a part of natural law in the sense that, by virtue of that law, all property would be held in common if men had not introduced any different provision.—Suárez, *De legibus*, Book II, chap. xiv, § 14.

Although nature may not have prescribed that things should always be owned in common (in which sense it is said that community of property comes negatively under natural law), nevertheless, while that condition of common ownership did exist, there was a positive precept of natural law to the effect that no one should be prohibited or prevented from making the necessary use of the common property. This positive precept in its own fashion is even now in existence with regard to those things which are common, and for so long as they are not in any way divided; for no one

may be prohibited from the common use of such things, generally speaking—apart, that is, from cases involving special necessity or a just cause. Moreover, in the same way, and arguing conversely, although division of property may not be prescribed by natural law, nevertheless, after this division has been made, and spheres of dominion have been distributed, the natural law forbids theft, or the undue taking of another's property.—*Ibid.*, § 17.

We obtain the ownership of certain property by the Law of Nations, which is everywhere observed among men, according to the dictates of natural reason; and we obtain the ownership of other things by the Civil Law, that is to say, by the law of our own country. And because the Law of Nations is the more ancient, as it was promulgated at the time of the origin of the human race, it is proper that it should be examined first.—*Digest* XLI. i. 1.

Things become the property of individuals in many ways, for we obtain the ownership of certain things by natural law which, as we have already stated, is called the Law of Nations, and we obtain the ownership of others by the Civil Law. It is more convenient, therefore, to begin with the more ancient law; for it is evident that natural law is the older because in the course of nature it originated at the same time with the human race; and civil laws only came into existence when states were founded, magistrates appointed, and laws committed to writing for the first time.—*Institutes* II. i. 11.

[According to the *jus gentium*], some thing is made equal to another in relation to a third thing, just as property may be private—one may not say in equity or justice—but such a division of property is ordered for the peace and concord of men which cannot be preserved unless every one should have his property clearly defined. And therefore it is the *jus gentium* that property should be private.—Vitoria, *De jure gentium et naturali.*[34]

If a particular piece of land be considered absolutely, it contains no reason why it should belong to one man more than to another, but if it be considered in respect of its adaptability to cultivation, and the unmolested use of the land, it has a certain commensuration to be the property of one and not of another man, as the Philosopher shows (*Polit.* ii. 2).—St. Thomas Aquinas, II.–II, qu. 57, art. 3.

[34] Trans. in Scott, *The Spanish Origin of International Law*, Part I, p. cxi.

Res Nullius

What does not belong to anyone by natural law becomes the property of the person who first acquires it.—*Digest* XLI. i. 3.

Wild beasts, birds, and fishes, that is to say all creatures that exist on the earth, in the sea, or in the air, as soon as they are taken by anyone immediately become his property by the Law of Nations, since whatever formerly belonged to no one is conceded by natural reason to the first person obtaining possession of the same.—*Institutes* II. i. 12.

Likewise, precious stones, gems, and other things which we find upon the seashore also at once become ours by natural law.—*Digest* I. viii. 3.

When an island arises in the sea, which rarely happens, it becomes the property of the first person who occupies it, for before that it is considered as belonging to no one.—*Institutes* II. i. 22.[35]

Possession of Property

Possession may be divided into two kinds for it is acquired either in good, or in bad faith.—*Digest* XLI. ii. 3, § 22.

A man is rightfully called a possessor in good faith so long as he does not know that he possesses another's property; but when he does know it, and does not renounce the other's property, he is then considered a possessor in bad faith, he is then rightly called an unjust man.—St. Augustine, *On Faith and Works,* vii. 10.

Possession, as Labeo says, is derived from the term *sedes,* or position, because it is naturally held by him who has it; and this the Greeks designate κατοχήν.

Nerva, the son, asserts that the ownership of property originated from natural possession, and that the trace of this still remains in the case of whatever is taken on the earth, on the sea, and in the air, for it immediately belongs to those who first acquire possession of it. Likewise, spoils taken in war, and an island formed in the sea, gems, precious stones, and pearls found upon the shore, become the property of him who first obtains possession of them.—*Digest* XLI. ii. 1, § 1.

The possession of goods is a right of possession, acquired by regular method and sure title.—Isidore, *Etymologies,* Book V, chap. xxv, § 6.

[35] A practically identical passage occurs in the *Digest* (XLI. i. 7, § 3).

Property (*res*) consists in those things which are grounded in our right. Rights (*iura*) pertain to those things which are rightly (*iuste*) possessed by us, and are not another's. But property (*res*) is so called from "rightly having" (*recte habendo*), right (*ius*) from rightly possessing (*iuste possidendo*). For that is possessed by right which is rightly possessed; that is rightly possessed which is well (*bene*) possessed. But what is badly possessed is another's. Furthermore, he possesses badly who either employs his own property badly, or takes another's property to himself. But he possesses rightly who is not ensnared by cupidity. Moreover, he who is held by cupidity is possessed; he is not a possessor.—*Ibid.*, §§ 2–3.

If the city or province in regard of which the doubt arises has no lawful possessor, . . . it seems that, if one party wants to settle and make a division or compromise as to part of the claim, the other is bound to accept his proposal, even if that other be the stronger and able to seize the whole by armed force; nor would he have a just cause of war.—Vitoria, *De iure belli*, Sec. 28.

After examination of the case the lawful possessor is not bound to quit possession so long as the doubt reasonably persists, but may lawfully retain it.—*Ibid.*, Sec. 30.

Even if those who came armed did not use their weapons in order to drive away the party in possession, but laid them aside, armed force will be held to have been employed; for the fear of weapons is sufficient to establish the fact of dispossession by armed force.—*Digest* XLIII. xvi. 3, § 5.

Prescription

There shall be a limit of time in the case of disputed things, and he who has had possession of them during a certain time shall no longer be liable to be disturbed.—Plato, *Laws*, XII, p. 954.

Prescription, in its strict sense, does not introduce a legal or dispositive rule, as does law. It confers rather a right of ownership or one of a similar kind to the use or enjoyment of some corporeal thing, as a house, an article of clothing, or of an incorporeal right, as the exercise of jurisdiction or the right of suffrage.—Suárez, *De legibus*, Book VII, chap. i, § 11.

Prescription based upon long possession is not usually granted for the acquisition of places which are public by the Law of Nations.—*Digest* XLI. iii. 45.

Prescription of long time is established where the parties are present, by continuous occupation for the term of ten years; where the parties are absent, by continuous occupation for twenty years.

Prescription for ten or twenty years also runs against public property, in favor of a person who had lawful possession in the beginning, and which was not in the meantime interrupted. The action of public property for damages is granted against those who have neglected to attend to matters of this kind.—*The Opinions of Julius Paulus,* V. ii. 3, 4.

The . . . obligation not to deprive another of the property which he has obtained by prescription, is a natural obligation, the violation of which would be theft.—Suárez, *De legibus,* Book II, chap. ix, § 9.

In a prescription, a right is acquired by one person against another contrary to the latter's will, who is deprived of his own property, or of his right; and it is for this that it has been necessary to fix definitely a certain time within which the [former] owner of a right can and ought to exercise diligence, in order to recover his own property, or to preserve his own rights, so that if he neglects to do so, he may be justly deprived of them. For this reason, then, according to the character of the property involved, and according to the presence or absence of the person prescribed against, a longer or shorter time is usually defined for the establishment of a prescription. In the establishment of a custom, however, no prescriptive right is acquired against an unwilling person; in fact, the custom is founded upon the tacit consent of the Prince . . . and hence it has not been necessary to define the length of the period whenever there is sufficient ground for assuming his tacit consent: the mere continuity of the custom, for a longer or shorter period, suffices.—*Ibid.,* Book VII, chap. viii, § 6.

Prescription is a matter of municipal law; hence it cannot be applied as between kings, or as between free and independent nations. It has even less standing when it is in conflict with that which is always stronger than the municipal law, namely, the law of nature or nations.—Grotius, *Mare liberum,* chap. vii.

It is impossible to acquire by usucaption or prescription things which cannot become property, that is, which are not susceptible of possession or quasi-possession, and which cannot be alienated. All of which is true with respect to the sea and its use.—*Ibid.*

Prescription based on no matter how immemorial a time, sets up no title to those things which are recognized as common to the use of mankind.—*Ibid.*

Usucaption

Usucaption cannot take place without possession.—*Digest* XLI. iii. 25.

Usucaption is the addition of ownership by means of continuous possession for a time prescribed by law.—*Ibid.*, 3.

Usucaption is the obtaining of dominium through the continuance of just possession either for two years, or for any longer time.—Isidore, *Etymologies,* Book V, chap. xxv, § 30.

The usucaption of property which we have obtained for other reasons than because we think that we are entitled to it as our own has been established in order to put an end to litigation.

A person can acquire by usucaption the property of which he has possession, thinking that it belongs to him; even if this opinion is false. This, however, should be understood to mean that a plausible error of the party in possession does not interfere with his right to usucaption.—*Digest* XLI. x. 5, § 1.

Uti Possidetis

This interdict, commonly called *Uti possidetis,* is for the purpose of retaining possession; for it is granted to prevent any violence being employed against the party in possession. . . .

In consideration of this interdict, it makes no difference whether the possession is just or unjust, so far as other parties are concerned; for he who is in possession, through this very fact, has a better right than he who does not occup the property.—*Ibid.*, XLIII. xvii. 1 (§ 4), 2.

Transfer

Nothing more accords with natural justice than to confirm the desire of an owner to transfer his property to another.—*Institutes* II. i. 40.

Property which becomes ours by delivery is acquired by us under the Law of Nations; for nothing is so conformable to natural equity as that the wish of an owner, who intends to transfer his property to another, should be complied with.—*Digest* XLI. i. 9, § 3.

When the ownership is transferred to him who receives it, it is transferred in the same condition that it was while in the possession of the grantor. If it is subject to a servitude, it passes with the servitude; if it is free, it passes in that condition; and if servitudes are due to the land which is transferred, it is conveyed together with the rights to the servitudes imposed for its benefit.—*Digest* XLI. i. 20, § 1.

A delivery of property should not and cannot transfer any more right in the same to him who receives it than he who delivers it possessed. Therefore, anyone who owns land, can transfer it by delivery; but if he did not have the ownership of the same, he does not convey anything to him who receives it.—*Ibid.*, 20.

Cession is the granting of one's own property, such as this: "I cede by right of ownership." For we use the term to cede, as it were, to concede, that is to say, referring to those things which are our own; because we restore another's property, we do not cede it.—Isidore, *Etymologies,* Book V, chap. xxv, § 32.

Things sold and delivered are not acquired by the purchaser unless he has paid the price to the vendor, or made him secure in some way, for example, by giving him a surety or pledge. This regulation was provided by a Law of the Twelve Tables, and also may properly be said to have been derived from the Law of Nations, that is, natural law. If the party who sold the article trusted the purchaser, it must be held that the subject of the sale at once becomes the property of the latter.—*Institutes* II. i. 41.

If my agent, by my direction, should purchase anything for me, and it is delivered to him in my name, the ownership of the article, that is to say, the title to it, is acquired by me, even if I am not aware of the fact.—*Digest* XLI. i. 13.

Religion Does Not Affect Ownership

The [Indian] aborigines undoubtedly had true dominion in both public and private matters, just like Christians, and . . . neither their princes nor private persons could be despoiled of their property on the ground of their not being true owners. It would be harsh to deny to those, who have never done any wrong, what we grant to Saracens and Jews, who are the persistent enemies of Christianity. We do not deny that these latter peoples are true owners of their property, if they have not seized lands elsewhere belonging to Christians.—Vitoria, *De Indis,* Sec. I, no. 24.

The people in question [the Indians] were in peaceable possession of their goods, both publicly and privately. Therefore, unless the contrary is shown, they must be treated as owners and not be disturbed in their possession unless cause be shown.—*Ibid.*, no. 4.

The barbarians . . . can not be barred from being true owners, alike in public and in private law, by reason of the sin of unbelief or any other mortal sin, nor does such sin entitle Christians to seize their goods and lands.—*Ibid.*, no. 19.

Although the Christian faith may have been announced to the Indians with adequate demonstration and they have refused to receive it, yet this is not a reason which justifies making war on them and depriving them of their property.—*Ibid.*, Sec. II, no. 15.

From the standpoint of the divine law a heretic does not lose the ownership of his property. This is generally accepted and is notorious.—*Ibid.*, Sec. I, no. 8.

Alluvion

Whatever a river adds to your land by alluvial soil belongs to you under the Law of Nations, for this deposit is a scarcely perceptible increase . . . at any moment of time.—*Institutes* II. i. 20.

Anything which a river adds to our land as alluvion is acquired by us under the Law of Nations. That, however, is considered to have been added by alluvion which is added little by little, so that we cannot perceive the amount which is added at each moment of time.—*Digest* XLI. i. 7, § 1.

Although it is not lawful to divert the natural course of a stream to another place by artificial means, still it is not forbidden to protect a bank against a rapid current. But where a river, having left its former channel, makes another for itself, the land which it surrounds remains the property of the former owner. If, however, it does this by degrees, and carries soil elsewhere, this is acquired under the right of alluvion by the person to whose land it is added.—*Code* VII. xli.

THE STATE

The good of man in society is, then, the subject of our discourse.—Aristotle, *Magna moralia* I. i. 10.

THE STATE

Man as a Social Being

NATURE . . . HAS BENT THE OTHER CREATURES DOWN TOWARD THEIR FOOD, SHE made man alone erect, and has challenged him to look up toward heaven, as being, so to speak, akin to him, and his first home.—Cicero, *De legibus* I. ix. 26–27.

Man is by nature a social being.—Aristotle, *Nicomachean Ethics,* I. vii. 6–7.

Forasmuch as each man is a part of the human race, and human nature is something social, and hath for a great and natural good, the power also of friendship; on this account God willed to create all men out of one, in order that they might be held in their society not only by likeness of kind, but also by bond of kindred.—St. Augustine, *De bono coniugali* 1.

There must be a union of those who cannot exist without each other; for example, of male and female, that the race may continue.—Aristotle, *Politics,* I. ii. 2.

Unless there be communication of life, all perishes.—Vitoria, *De potestate civili,* no. 4.

In order that proper provision might be made for . . . [their] needs, it was necessary that men should not wander singly and in solitude, after the manner of wild beasts, but should dwell in a fellowship in which they might be of aid to one another.—*Ibid.*

Riches be a thing which every man wisheth, yet no man of judgment can esteem it better to be rich, than wise, virtuous, and religious. If we be both or either of these, it is not because we are so born. For into the world we come as empty of the one as of the other, as naked in mind as we are in body.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. x. 2.

. . . Since [man] is born naked, defenceless against the excesses of the surrounding air and of the other elements; since he is born subject to

suffering and corruption, . . . he has needed arts of diverse kinds and species, in order that he may avert these baleful influences. Moreover, in view of the fact that such arts cannot be practiced save by a large number of men nor preserved save through mutual exchange among human beings, it has been essential that men should congregate in order to obtain the advantages resulting from such [arts] and in order to escape misfortune.—Marsiglio of Padua, *Defensor pacis, Dictio* I, chap. iv, sec. 3.

Towns and cities were established in the first place in order to obtain those things which are necessary to sustain human life.—Egidio Colonna, *Li Livres du gouvernement des rois,* Book III, Part I, chap. i.

Even were each one sufficient to himself for the necessities of life, yet he would never, unaided, be able to protect himself from the attacks of wild beasts and robbers, but for this purpose it is necessary for men to assemble and to ward off attacks with their combined strength. . . . granted that one man might prevail against an enemy, yet he would always remain ignorant, and destitute of wisdom and of justice and of many other virtues, although, indeed, we are born for this very purpose, expressly to cultivate our mind and our will, for the arts and sciences were developed after a long time and by many men, and without a teacher they cannot be learned. —Bellarmine, *De laicis* v (Murphy trans., p. 21).

In the household are first found the origins and springs of friendship, of political organization and of justice.—Aristotle, *Eudemian Ethics,* VII. x. 9.

Human life is founded on kindness and concord, and is bound into an alliance for common help, not by terror, but by mutual love.—Seneca, *De ira* I. v. 3.

No one can live happily who has regard to himself alone and transforms everything into a question of his own utility; you must live for your neighbour, if you would live for yourself. This fellowship, maintained with scrupulous care, . . . makes us mingle as men with our fellow-men and holds that the human race have certain rights in common.—Seneca, *Epistulae morales* XLVIII. 3.

Friendship among men exists by natural law and it is against nature to shun the society of harmless folk. . . . "When it is said 'Love thy neighbour,' it is clear that every man is our neighbor." (St. Augustine's *De doctrina Christiana.*)—Vitoria, *De Indis,* Sec. III, no. 2.

"Nature has established a bond of relationship between all men," [*Dig.* I. i. 3] and so it is contrary to natural law for one man to dissociate himself from another without good reason.—*Ibid.*, no. 3.

We must trace back to their ultimate sources the principles of fellowship and society that nature has established among men. The first principle is that which is found in the connection subsisting between all the members of the human race; and that bond of connection is reason and speech, which by the processes of teaching and learning, of communicating, discussing, and reasoning associate men together and unite them in a sort of natural fraternity. In no other particular are we farther removed from the nature of beasts; for we admit that they have courage (horses and lions, for example); but we do not admit that they have justice, equity, and goodness; for they are not endowed with reason or speech.

This, then, is the most comprehensive bond that unites together men as men and all to all; and under it the common right to all things that nature has produced for the common use of man is to be maintained, with the understanding that, while everything assigned as private property by the statutes and by civil law shall be so held as prescribed by those same laws, everything else shall be regarded in the light indicated by the Greek proverb: "Amongst friends all things in common."—Cicero, *De officiis* I. xvi. 50–51.

While other creatures possess a strength that is adequate for their self-protection, and those that are born to be wanderers and to lead an isolated life have been given weapons, the covering of man is a frail skin; no might of claws or of teeth makes him a terror to others, naked and weak as he is, his safety lies in fellowship.

God has given to him two things, reason and fellowship, which, from being a creature at the mercy of others, make him the most powerful of all; and so he who, if he were isolated, could be a match for none is the master of the world. Fellowship has given to him dominion over all creatures; fellowship, though he was begotten upon the land, has extended his sovereignty to an element not his own, and has bidden him be lord even upon the sea; it is this that has checked the assaults of disease, has made ready supports for old age, has provided solace for sorrow; it is this that makes us brave, this that we may invoke as a help against Fortune. Take away this fellowship, and you will sever the unity of the human race on which its very existence depends.—Seneca, *De beneficiis* IV. xviii. 2–4.

We covet (if it might be) to have a kind of society and fellowship even with all mankind. Which thing Socrates intending to signify professed himself a citizen, not of this or that commonwealth, but of the world. And an effect of that very natural desire in us, (a manifest token that we wish after a sort an universal fellowship with all men,) appeareth by the wonderful delight men have, some to visit foreign countries, some to discover nations not heard of in former ages, we all to know the affairs and dealings of other people, yea to be in league of amity with them: and this not only for traffic's sake, or to the end that when many are confederated each may make other the more strong, but for such cause also as moved the Queen of Saba to visit Salomon; and in a word, because nature doth presume that how many men there are in the world, so many Gods as it were there are, or at leastwise such they should be towards men.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. x. 12.

It is the duty of a man to protect men's interests and safety. . . . This is due to any man from any other, for the very reason that they are alike men; and also because human nature, the common mother of them all, commends one to the other.—Gentili, *De jure belli,* Book I, chap. xv.

When we unite with one another in . . . fellowship, we invoke nature; when we form a treaty, the law of nations; when we are joined together by common laws, the state; when we have a common religion (the strongest tie of all), we appeal to the hearts of men and the saint who is the fountain head of that union.—*Ibid.*

I believe that it is a commmon characteristic of all uncivilized peoples to drive away strangers.—*Ibid.,* chap. xix.

Man as a Political Being

The manners of the Androphagi are more savage than those of any other race. They neither observe justice, nor are governed by any laws.—*The History of Herodotus,* Book IV, chap. 106.

If, indeed, it were fitting that man should live alone, as do many animals, there would be no need for any one to direct him towards his end, but each one would be a king unto himself, under God the supreme king; in so far as man is divinely endowed with reason by which to direct his own action. But it is man's nature that he should be a social and political animal, living in a multitude much more than is the case with all other animals, as is indicated by his natural needs. . . . for man alone cannot be sufficient

unto himself. It is therefore natural to man that he should live in society.—St. Thomas Aquinas, *De regimine principum,* Book I, chap. i.

Civil society doth more content the nature of man than any private kind of solitary living.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. x. 12.

Man is by nature a political animal. And therefore, men, even when they do not require one another's help, desire to live together all the same, and are in fact brought together by their common interests in proportion as they severally attain to any measure of well-being. This is certainly the chief end, both of individuals and of states.—Aristotle, *Politics,* III. vi. 3–4.

We are born for Justice, and . . . right is based, not upon men's opinions, but upon Nature. This fact will immediately be plain if you once get a clear conception of man's fellowship and union with his fellow-men.—Cicero, *De legibus* I. x. 28–29.

The sense of mutual attraction which unites human beings as such . . . is bestowed by nature. The mere fact of their common humanity requires that one man should feel another man to be akin to him. . . . It follows that we are by nature fitted to form unions, societies and states.—Cicero, *De finibus* III. xix. 63.

People (*populus*) is the name of the human multitude, bound together by a unanimity of law and harmonious fellowship.—Isidore, *Etymologies,* Book IX, chap. iv, § 5.

On the other hand, famous philosophers have dealt, logically and (as it were) completely, with the subject of living and living aright, or in other words, the subject of the good life, in its first or mundane phase; as well as with the things that are essential to such an existence. In so doing, they have come to the conclusion that for the attainment of this end there is need of a civil community, without which the adequate life cannot be achieved.—Marsiglio of Padua, *Defensor pacis, Dictio* I, chap. iv, sec. 3.

As we are undertaking to treat of Ethics or Morality, we must begin by inquiring by what branch of science moral character is considered. We may answer briefly, by Political or Social science, and no other. For without character, a man can achieve nothing in association with his fellows. He must be a man of moral worth; and moral worth means possession of the virtues. Whosoever therefore would achieve anything in social or political

life must be of good moral character; which indicates that the discussion of character not only belongs to Social science, but is its very foundation or starting-point. And I would go so far as to assert that such a discussion would more fittingly be termed Social than Ethical.—Aristotle, *Magna moralia* I. i. 1–3.

The civilized life of man is far removed from the standard of the comforts and wants of the lower animals. And without the association of men, cities could not have been built or peopled. In consequence of city life, laws and customs were established, and then came the equitable distribution of private rights and a definite social system. Upon these institutions followed a more humane spirit and consideration for others, with the result that life was better supplied with all it requires, and by giving and receiving, by mutual exchange of commodities and conveniences, we succeeded in meeting all our wants.—Cicero, *De officiis* II. iv. 15.

An intellectual creature, by virtue of the very fact that he is a created being, has a superior to whose providence and control he is subject; while, for the very reason that he is intellectual, he is capable of being subjected to moral government.—Suárez, *De legibus,* Book I, chap. iii, § 3.

Society is order among many, for a disorderly and scattered multitude is not called society.—Bellarmine, *De laicis* v (Murphy trans., p. 22).

Since human societies have been established . . . that we should bear one another's burdens—and since civil society is of all societies that which best provides for the needs of men, it follows that the community is, so to speak, an exceedingly natural form of intercommunication: that is, a form thoroughly in accord with Nature.—Vitoria, *De potestate civili,* no. 4.

Aristotle points out (*Politics,* I [II. ix]) that man is by nature a civil and sociable animal. And truly the will, whose chief ornaments are justice and friendship, would of necessity be entirely deformed and, so to speak, crippled, if it were separated from human society: justice, indeed, cannot be practised except by the multitude; and the same is true of friendship.—*Ibid.*

The majority of those engaged in politics are not correctly designated "politicians," for they are not truly political, since the political man is one who purposely chooses noble actions for their own sake, whereas the majority embrace that mode of life for the sake of money and gain.—Aristotle, *Eudemian Ethics,* I. v. 12.

Romulus . . . called the people together and gave them the rules of law, since nothing else but law could unite them into a single body politic.—Livy, I. viii. 1.

Mankind is ruled in two ways, to wit: by natural law and by customs.—Gratian, *Decretum,* Part I, dist. i.

Origin and Nature of the State

For who . . . does not know the condition of nature once to have been such that men, in the days before either natural or civil law had been drawn up, wandered, dispersed and scattered about the fields, and that each possessed only what he could seize or keep by his own strength, through killing or wounding others? Those, then, who first arose endowed with superior virtue and prudence, having recognized a kind of docility and intelligence in man, gathered these scattered individuals together in one place and converted them from their savage state to justice and gentleness. Once divine and human law had been discovered, they fortified with walls those groups established for the general advantage which we term commonwealths, and also the small associations of men which were afterwards called city-states, as well as those clusters of domiciles to which we give the name of cities.—Cicero, *Pro Sexto* xlii. 91–92.

He who by nature and not by mere accident is without a state, is either above humanity, or below it; he is the

"Tribeless, lawless, heartless one,"

whom Homer [*Iliad,* Book IX, line 63] denounces—the outcast who is a lover of war; he may be compared to a bird which flies alone.—Aristotle, *Politics,* I. ii. 9–10.

Man, in so far as he is a man, is a part of the state, because he is a political animal.—Cajetan, *On St. Thomas Aquinas,* I.–II, qu. 92, art. 1.

A state is composite, and, like any other whole, made up of many parts;—these are the citizens, who compose it.—Aristotle, *Politics,* III. i. 2.

The family is the association established by nature for the supply of men's every day wants. . . . But when several families are united, and the association aims at something more than the supply of daily deeds, then comes into existence the village . . .

When several villages are united in a single community, perfect and large enough to be nearly or quite self-sufficing, the state comes into existence,

originating in the bare needs of life, and continuing in existence for the sake of a good life. And therefore, if the earlier forms of society are natural, so is the state, for it is the end of them, and the [completed] nature is the end . . .

Hence it is evident that the state is a creation of nature, and that man is by nature a political animal. . . .

The proof that the state is a creation of nature . . . is that the individual, when isolated, is not self-sufficing; and therefore he is like a part in relation to the whole. But he who is unable to live in society, or who has no need because he is sufficient for himself, must be either a beast or a god: he is no part of a state. A social instinct is implanted in all men by nature, and yet he who first founded the state was the greatest of benefactors. For man, when perfected, is the best of animals, but, when separated from law and justice, he is the worst of all; since armed injustice is the more dangerous, and he is equipped at birth with the arms of intelligence and with moral qualities which he may use for the worst ends. Wherefore, if he have not virtue, he is the most unholy and the most savage of animals, and the most full of lust and gluttony. But justice is the bond of men in states, and the administration of justice, which is the determination of what is just, is the principle of order in political society.—Aristotle, *Politics,* I. ii. 5, 8, 9, 14–16.

States and commonwealths had not their fount and origin in the invention of man, nor in any artificial manner, but sprang, as it were, from Nature, who produced this method of protecting and preserving mortals.—Vitoria, *De potestate civili,* no. 5.

Do you think a city ends with its walls? A city is in its citizens, not in its walls.—St. Augustine, *Sermon on the Destruction of the City,* VI.

The *civitas* is not made up of any living creatures whatsoever, but is rather a multitude of rational beings, a multitude bound together by the law of one single society.—St. Augustine, *Evangelical Questions,* XLVI.

What is a republic but a commonwealth? Therefore its interests are common to all; they are the interests of the State. Now what is a State but a multitude of men bound together by some bond of concord?—St. Augustine, Letter CXXXVIII. ii, "To Marcellinus."

It is a characteristic of man that he alone has any sense of good and evil, of just and unjust, and the association of living beings who have this sense makes a family and a state.—Aristotle, *Politics,* I. ii. 12.

There are a great many degrees of closeness or remoteness in human society. To proceed beyond the universal bond of our common humanity, there is the closer one of belonging to the same people, tribe, and tongue, by which men are very closely bound together; it is a still closer relation to be citizens of the same city-state; for fellow-citizens have much in common —forum, temples, colonnades, streets, statutes, laws, courts, rights of suffrage, to say nothing of social and friendly circles and diverse business relations with many.

But a still closer social union exists between kindred. Starting with that infinite bond of union of the human race in general, the conception is now confined to a small and narrow circle. For since the reproductive instinct is by nature's gift the common possession of all living creatures, the first bond of union is that between husband and wife; the next, that between parents and children; then we find one home, with everything in common. And this is the foundation of civil government, the nursery, as it were, of the state. Then follow the bonds between brothers and sisters, and next those of first and then of second cousins; and when they can no longer be sheltered under one roof, they go out into other homes, as into colonies. Then follow between these, in turn, marriages and connections by marriage, and from these again a new stock of relations; and from this propagation and after-growth states have their beginnings. The bonds of common blood hold men fast through good-will and affection; for it means much to share in common the same family traditions, the same forms of domestic worship, and the same ancestral tombs.—Cicero, *De officiis* I. xvii. 53–55.

According to Aristotle (*Politics* I. 1 [or *Pol.* I. 2])[1] the state is *a perfect community, containing the elements of self-sufficiency . . .; and thus, while it was created for the sake of life, it continues in existence for the sake of the good life*. Now, the latter part of this Aristotelian statement (*while it was created for the sake of life, it continues in existence for the sake of the good life*) points to the ultimate and perfect purpose of the institution in question; for they who lead a civil life do not merely live, an activity in which [even] beasts and slaves participate; rather, they live aright—that is to say, with leisure for such noble works as those constituting the practical

[1] It is difficult to check adequately the Aristotelian references given by Marsiglio, owing to the different systems of numbering used in various modern editions of the *Politics;* as well as to the fact that Marsiglio sometimes paraphrases (rather loosely) the trend of an entire passage, when he would seem to be quoting a specific statement. The bracketed numerals represent references supplied by Previté-Orton in his admirable edition of Marsiglio, and correspond to the numbering in Jowett's translation of the *Politics*.

and theoretical essence of the virtues.—Marsiglio of Padua, *Defensor pacis*, *Dictio* I, chap. iv, sec. 1.

In view, however, of the fact that among men so congregated, contentions and quarrels spring up—which would result, if they were not regulated by the precepts of justice, in battles, in division among human beings, and finally, in a consequent decay of the state—it became necessary to establish in connection with this intercommunication, a rule of justice, and a guardian or administrator thereof. Inasmuch as it is the function of this guardian to ward off dangerous transgressors and other individuals who cause disturbance or attempt to overthrow the state (whether from within or from without), it was found to be essential that the state should possess within itself some means of resisting these individuals. And again, since the community needs conveniences, means of reparation, and sources of protection for certain common possessions, with varying requisites according to whether the times are peaceful or warlike, it has been necessary for the said community to include within itself, persons who will meet these requirements, so that the common need may be relieved whenever such assistance shall be expedient or imperative. . . . Accordingly, men were assembled together in order that they might live adequately, with power to secure for themselves those things which had long been accounted as necessities and to transmit such necessities to one another. Now, this association, in the perfect and self-sufficient form here described, has been designated as "the state." We have already pointed out, after a fashion, the ultimate purpose of the state, and its several parts; but we shall discuss these matters with discrimination, and more fully, in a later context. For, inasmuch as persons desiring to live adequately have various needs which cannot be satisfied through the agency of men pertaining to a single rank or office, it has been essential for the said association to include various ranks or offices of men to administer or provide for such varying necessities, indispensable to persons who live adequately. But these diverse human ranks or offices are nothing more nor less than the several and distinct parts of the state.—*Ibid.*, sec. 4.

Human society is twofold: imperfect, or domestic; and perfect, or political. Of these divisions, the former is in the highest degree natural and (so to speak) fundamental, because it arises from the fellowship of man and wife, without which the human race could not be propagated nor preserved; wherefore it has been written, "It is not good for man to be alone." From this union there follows as a direct consequence, the fellowship of children and parents; for the earlier form of union is ordained for the rearing of

the children, and they require union and fellowship with their parents (in early life, at least, and throughout a long period of time) since otherwise they could not live, nor be fittingly reared, nor receive the proper instruction. Furthermore, to these [forms of domestic society] there is presently added a connection based on slavery or servitude and lordship, since, practically speaking, men require the aid and service of other men.

Now, from these three forms of connection there arises the first human community, which is said to be imperfect from a political standpoint. The family is perfect in itself, however, for purposes of domestic or economic government.

But this community—as I have already indicated above—is not self-sufficing; and therefore, from the very nature of the case, there is a further necessity among human beings, for a political community, consisting at least of a city state (*civitas*), and formed by the coalition of a number of families. For no family can contain within itself all the offices and arts necessary for human life, and much less can it suffice for attaining knowledge of all things needing [to be known].—Suárez, *De legibus,* Book III, chap. i, § 3.

All public regiment of what kind soever seemeth evidently to have risen from deliberate advice, consultation, and composition between men, judging it convenient and behoveful; there being no impossibility in nature considered by itself, but that men might have lived without any public regiment. Howbeit, the corruption of our nature being presupposed, we may not deny but that the law of nature doth now require of necessity some kind of regiment; so that to bring things unto the first course they were in, and utterly to take away all kind of public government in the world, were apparently to overturn the whole world. . . .

The case of man's nature standing therefore as it doth, some kind of regiment the law of nature doth require; yet the kinds thereof being many, nature tieth not to any one, but leaveth the choice as a thing arbitrary.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. x. 4–5.

I use the word "State" . . . to mean not the soil itself (which would be absurd, for all soil is a brave man's fatherland), but in Cicero's sense as an assemblage of individuals compacted into a society by identity of law and community of interest.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. ii, § 22.

When a man builds, he places stone upon stone; and when a man destroys, he tears stone down from stone. Man made this; man destroyed it.

. . . Man himself is the ornament of the state; man himself, the inhabitant, the ruler, the governor of the state, so comes that he may go; was so born that he might die; so comes in, that he may pass away.—St. Augustine, Sermon LXXXI, § 9.

For the rights of a people do not reside in individuals, but in the *universitas* (aggregate), and this *universitas* is represented by successors as well as by those alive at any given time.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. v, § 43.

As far as the identity of the people is concerned, although it could not be called the same people if all the old members of the community were removed in an instant and the new population substituted, yet it is certainly the same if it was gradually changed, even though the change was complete. —Gentili, *De jure belli,* Book I, chap. xxiii.

A state or a people, viewed as a community, is essentially perpetual, persisting through a continuous process of succession.—Suárez, *De legibus,* Book VII, chap. ix, § 1.

As any man's deed past is good as long as himself continueth; so the act of a public society of men done five hundred years sithence standeth as theirs who presently are of the same societies, because corporations are immortal; we were then alive in our predecessors, and they in their successors do live still.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. x. 8.

If every nation were to bring all its evil deeds to a given place, in order to make an exchange with some other nation, when they had all looked carefully at their neighbours' faults, they would be truly glad to carry their own back again.—*The History of Herodotus,* Book VII, chap. 152.

The State as a Well-ordered and Perfect Community

Where there is a group, there are individuals: but it does not follow that where there are individuals there is a group. For there can be individual things without a corporate group; but there cannot be a corporate group except that it consist of individuals of whatsoever kind. For all the individuals gathered together, or reckoned as a whole, make a group.—St. Augustine, *Questions on the Heptateuch,* III. xxvi.

The blessedness of a community and of an individual flow from the same source; for a community is nothing else than a harmonious collection of individuals.—St. Augustine, *De civitate Dei,* Book I, chap. xiv.

Give oneness, and it is a people; take away oneness, and it is a mob. For what is a mob, except a disordered multitude?—St. Augustine, Sermon CIII, ch. iii.

It is impossible to live well except in a good commonwealth, and nothing can produce greater happiness than a well-constituted State.—Cicero, *De re publica* V. v. 7.

In my opinion there are two fundamental things in every state, by virtue of which its principle and constitution are either desirable or the reverse. I mean customs and laws. What is desirable in these makes men's private lives righteous and well ordered and the general character of the state gentle and just, while what is to be avoided has the opposite effect. So just as when we observe the laws and customs of a people to be good, we have no hesitation in pronouncing that the citizens and the state will consequently be good also, thus when we notice that men are covetous in their private lives and that their public actions are unjust, we are plainly justified in saying that their laws, their particular customs, and the state as a whole are bad. —Polybius, *The Histories,* VI, chap. 47. 1–3.

Man is a social animal, requiring by his very nature a civil life and intercourse with other men; therefore, it is necessary that he should live rightly, not only as a private person, but also as a part of a community; and this is a matter which depends to a large extent upon the laws of the individual community.—Suárez, *De legibus,* Book I, chap. iii, § 19.

Since it is fitting for man to live in a multitude, because if he remains alone he is not sufficient to himself for the needs of life, it follows that the more perfect the society of the multitude is, the better will it suffice for the needs of life.—St. Thomas Aquinas, *De regimine principum,* Book I, chap. i.

Human society ought to be a perfect State, therefore, it should have the power to preserve itself, hence, to punish disturbers of the peace.—Bellarmine, *De laicis* vi (Murphy trans., pp. 25–26).

A perfect community is in general defined as one which is capable of possessing a political government.—Suárez, *De legibus,* Book I, chap. vi, § 19.

A State is properly called a perfect community. . . . A perfect State or community, therefore, is one which is complete in itself, that is, which is not a part of another community, but has its own laws and its own council and its own magistrates.—Vitoria, *De iure belli,* no. 7.

There is no obstacle to many principalities and perfect States being under one prince.—Vitoria, *De iure belli,* no. 7.

The members of a state must either have (1) all things or (2) nothing in common, or (3) some things in common and some not. That they should have nothing in common is clearly impossible, for the state is a community, and must at any rate have a common place—one city will be in one place, and the citizens are those who share in that one city. But should a well-ordered state have all things, as far as may be, in common, or some only and not others? For the citizens might conceivably have wives and children and property in common, as Socrates proposes in the Republic of Plato [V. 457c]. Which is better, our present condition, or the proposed new order of society?—Aristotle, *Politics,* II. i. 2–3.

What nature has ordained comes to pass by Right, for nature in her providence is not inferior to man in his; if she were, the effect would exceed the cause in goodness, which cannot be. Now we know that in instituting corporate assemblies, not only is the relation of members among themselves taken into account, but also their capacities for exercising office. This is a consideration of the limit of Right in a public body or order, seeing that Right does not extend beyond the possible. Nature, then, in her ordinances does not fail of this provision, but clearly ordains things with reference to their capacities, and this reference is the foundation of Right on which things are based by nature. From this it follows that natural order in things cannot come to pass without Right, since the foundation of Right is inseparably bound to the foundation of order. The preservation of this order is therefore necessarily Right.—Dante, *De monarchia* II. vii. 1.

The State as a Union Based on Agreement

A state is not a mere aggregate of persons, but a union of them sufficing for the purposes of life.—Aristotle, *Politics,* VII. viii. 8.

Friendship appears to be the bond of the state; and lawgivers seem to set more store by it than they do by justice, for to promote concord, which seems akin to friendship, is their chief aim, while faction, which is enmity, is what they are most anxious to banish. And if men are friends, there is no need of justice between them; whereas merely to be just is not enough: a feeling of friendship also is necessary. Indeed the highest form of justice seems to have an element of friendly feeling in it.—Aristotle, *Nicomachean Ethics,* VIII. i. 4.

We are by nature united and allied in the common society of the state. Were this not so, there would be no room either for justice or benevolence.—Cicero, *De finibus* III. xx. 66.

A people is an assemblage of reasonable beings bound together by a common agreement as to the objects of their love.—St. Augustine, *De civitate Dei*, Book XIX, chap. xxiv.

In order to discover the character of any people, we have only to observe what they love. Yet whatever it loves, if only it is an assemblage of reasonable beings and not of beasts, and is bound together by an agreement as to the objects of love, it is reasonably called a people; and it will be a superior people in proportion as it is bound together by higher interests, inferior in proportion as it is bound together by lower.—*Ibid.*

People (*populus*) is the name of the human multitude, bound together by a unanimity of law and harmonious fellowship.—Isidore, *Etymologies*, Book IX, chap. iv, § 5.

A multitude of men does not suffice to constitute a community, unless those men are bound together by a particular agreement, looking toward a particular end, and existing under a particular head.—Suárez, *De legibus*, Book I, chap. vi, § 19.

Two foundations there are which bear up public societies; the one, a natural inclination, whereby all men desire sociable life and fellowship; the other, an order expressly or secretly agreed upon touching the manner of their union in living together. The latter is that which we call the law of a commonweal, the very soul of a politic body, the parts whereof are by law animated, held together, and set on work in such actions as the common good requireth.—Hooker, *Of the Laws of Ecclesiastical Polity*, I. x. 1.

To take away . . . mutual grievances, injuries, and wrongs [among men] there was no way but only by growing unto composition and agreement amongst themselves, by ordaining some kind of government public, and by yielding themselves subject thereunto; that unto whom they granted authority to rule and govern, by them the peace, tranquillity, and happy estate of the rest might be procured.—*Ibid.*, 4.

The Purpose of the State

All men desire to lead in this world a happy life.—*Ibid.*, 2.

A state exists for the sake of a good life, and not for the sake of life only: if life only were the object, slaves and brute animals might form a state, but

they cannot, for they have no share in happiness or in a life of free choice. —Aristotle, *Politics,* III. ix. 6.

Every state is a community of some kind, and every community is established with a view to some good. . . . But, if all communities aim at some good, the state or political community, which is the highest of all, and which embraces all the rest, aims, and in a greater degree than any other, at the highest good.—*Ibid.,* I. i. 1.

A state is not a mere society, having a common place, established for the prevention of crime and for the sake of exchange. These are conditions without which a state cannot exist; but all of them together do not constitute a state, which is a community of well-being in families and aggregations of families, for the sake of a perfect and self-sufficing life.—*Ibid.,* III. ix. 12.

Statecraft . . . shows us how to build up a nation from its beginning, as well as how to order rightly a nation that already exists. . . .

By a Nation we mean an assemblage of houses, lands, and property sufficient to enable the inhabitants to lead a civilized life. This is proved by the fact that when such a life is no longer possible for them, the tie itself which unites them is dissolved. Moreover, it is with such a life in view that the association is originally formed; and the object for which a thing exists and has come into being is in fact the very essence of that particular thing.—Aristotle, *Oeconomica* I. i. 1–2.

Friendship is the motive of society. The end is the good life. . . . And the state is the union of families and villages having for an end a perfect and self-sufficing life, by which we mean a happy and honorable life.—Aristotle, *Politics,* III. ix. 13–14.

Our aim in founding the State was not the disproportionate happiness of any one class, but the greatest happiness of the whole.—Plato, *Republic,* IV, p. 420.

The Good of man must be the end of the science of Politics. For even though it be the case that the Good is the same for the individual and for the state, nevertheless, the good of the state is manifestly a greater and more perfect good, both to attain and to preserve. To secure the good of one person only is better then nothing; but to secure the good of a nation or a state is a nobler and more divine achievement.—Aristotle, *Nicomachean Ethics,* I. ii. 7–8.

Virtue must be the serious care of a state which truly deserves the name: for [without this ethical end] the community becomes a mere alliance which differs only in place from alliances of which the members live apart; and law is only a convention, "a surety to one another of justice," as the sophist Lycophron says, and has no real power to make the citizens good and just.—Aristotle, *Politics,* III. ix. 8.

A commonwealth is the property of a people. But a people is not any collection of human beings brought together in any sort of way, but an assemblage of people in large numbers associated in an agreement with respect to justice and a partnership for the common good. The first cause of such an association is not so much the weakness of the individual as a certain social spirit which nature has implanted in man. For man is not a solitary or unsocial creature, but born with such a nature that not even under conditions of great prosperity of every sort [is he willing to be isolated from his fellow men].—Cicero, *De re publica* I. xxv. 39.

. . . Men have come together in the civil community for the sake of convenience and in order to live adequately, while avoiding the contrary conditions. Therefore, those matters which relate to the general advantage and disadvantage should be generally known and proclaimed, so that all persons may be enabled to attain that which is advantageous and to repel that which is disadvantageous.—Marsiglio of Padua, *Defensor pacis, Dictio* I, chap. xii, sec. 7.

If the individual families were divided one from another, peace could scarcely be preserved among men, nor could wrongs be duly averted or avenged; so that Cicero has said (*De amicitia*):[2] "Nothing in human affairs is more pleasing to God our Sovereign, than that men should have among themselves an ordered and perfect society, which (continues Cicero) is called a city-state (*civitas*)." Moreover, this community may be still further augmented, becoming a kingdom or principality by means of the association of many city-states; a form of community which is also very appropriate for mankind—appropriate, at least, for its greater welfare—owing to the above-stated reasons, applied in due proportion, although the element of necessity is not entirely equal [in the two cases].—Suárez, *De legibus,* Book III, chap. i, § 3.

[2] This passage is not found in Cicero's *De amicitia*. Suárez probably had in mind a passage of Cicero's *De re publica,* Book VI, chap. xiii, to the effect that "nothing of all that is done on earth is more pleasing to that supreme God who rules the whole universe than the assemblies and gatherings of men associated in justice, which are called States."

A State . . . arises . . . out of the needs of mankind; no one is self-sufficing, but all of us have many wants . . . as we have many wants, and many persons are needed to supply them, one takes a helper for one purpose and another for another; and when these partners and helpers are gathered together in one habitation the body of inhabitants is termed a State.—Plato, *Republic,* II, p. 368.

Men . . . knew that howsoever men may seek their own commodity, yet it this were done with injury unto others it was not to be suffered, but by all men and by all good means to be withstood; finally they knew that no man might in reason take upon him to determine his own right, and according to his own determination proceed in maintenance thereof, inasmuch as every man is towards himself and them whom he greatly affecteth partial; and therefore that strifes and troubles would be endless, except they gave their common consent all to be ordered by some whom they should agree upon.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. x. 4.

The state . . . is wont to stand in the place of a parent.—St. Augustine, *On the Freedom of the Will,* I. xiv. 32.

Safety is always the right of a community.—Gentili, *De jure belli,* Book I, chap. xvii.

Nationality and Domicile

I use the term "citizen," . . . in accordance with Aristotle (*Politics* III. i. 3 & 7 [or, *Pol.* III. i. 3, 13][3]), to designate that person who partakes, within the civil community, of either deliberative or judicial authority, in accordance with his station.—Marsiglio of Padua, *Defensor pacis, Dictio* I, chap. xii, sec. 4.

There are four ways in which any person may be related to a given domain or diocese: first, as a permanent inhabitant thereof, actually living and residing therein; secondly, at the opposite extreme, as one who has neither of these relations with the domain in question; thirdly, as a permanent inhabitant of this domain, having his domicile therein, but dwelling abroad at the time; fourthly, as being present in the said domain, but having neither domicile nor origin therein.—Suárez, *De legibus,* Book III, chap. xxxii, § 1.

If children of any Spaniard be born there [meaning in the principalities of the New World] and they wish to acquire citizenship, it seems they

[3] See also *Politics,* III. xi.

cannot be barred either from citizenship or from the advantages enjoyed by other citizens—I refer to the case where the parents had their domicile there. The proof of this is furnished by the rule of the law of nations, that he is to be called and is a citizen who is born within the state (*Code,* VII. lxii. 11). . . . As man is a civil animal, whoever is born in any one state is not a citizen of another state. Therefore, if he were not a citizen of the state referred to, he would not be a citizen of any state, to the prejudice of his rights under both natural law and the law of nations.—Vitoria, *De Indis,* Sec. III, no. 5.

There is nothing to prevent anyone from having his domicile wherever he wishes, for the reason that he is not forbidden to do so.—*Digest* L. i. 31.

If there be any persons who wish to acquire a domicile in some state of the Indians, as by marriage or in virtue of any other fact whereby other foreigners are wont to become citizens, they cannot be impeded any more than others, and consequently they enjoy the privileges of citizens just as others do, provided they also submit to the burdens to which others submit. —Vitoria, *De Indis,* Sec. III, no. 5.

Non-resident foreigners are not subjects; for the status of subject, in so far as concerns the direction of conduct and binding obligation, is acquired only through domicile, or, at least, through quasi-domicile.—Suárez, *De legibus,* Book III, chap. xxxiii, § 2.

The State and the Citizen

The goodness of any part is considered in comparison with the whole; hence Augustine says (Conf. iii.) that "unseemly is the part that harmonizes not with the whole." Since then every man is a part of the state, it is impossible that a man be good, unless he be well proportionate to the common good: nor can the whole be well consistent unless its parts be proportionate to it. Consequently the common good of the state cannot flourish, unless the citizens be virtuous, at least those whose business it is to govern.—St. Thomas Aquinas, I.–II, qu. 92, art. 1, ad 3.

The private individual ought first, in private relations, to live on fair and equal terms with his fellow-citizens, with a spirit neither servile and grovelling nor yet domineering; and second, in matters pertaining to the state, to labour for her peace and honour; for such a man we are accustomed to esteem and call a good citizen.—Cicero, *De officiis* I. xxxiv. 124.

In choosing between conflicting duties, that class takes precedence which is demanded by the interests of human society.—Cicero, *De Officiis* I. xlv. 160.

Every duty . . . that tends effectively to maintain and safeguard human society should be given the preference over that duty which arises from speculation and science alone.—*Ibid.*, xliv. 158.

Just as the laws set the safety of all above the safety of individuals, so a a good, wise and law-abiding man, conscious of his duty to the state, studies the advantage of all more than that of himself or of any single individual. The traitor to his country does not deserve greater reprobation than the man who betrays the common advantage or security for the sake of his own advantage or security.—Cicero, *De finibus* III. xix. 64.

This is the highest statesmanship and the soundest wisdom on the part of a good citizen, not to divide the interests of the citizens but to unite all on the basis of impartial justice.—Cicero, *De officiis* II. xxiii. 83.

This, then, ought to be the chief end of all men, to make the interest of each individual and of the whole body politic identical. For if the individual appropriates to selfish ends what should be devoted to the common good, all human fellowship will be destroyed.

And further, if nature ordains that one man shall desire to promote the interests of a fellow-man, whoever he may be, just because he is a fellow-man, then it follows, in accordance with that same nature, that there are interests that all men have in common. And if this is true, we are all subject to one and the same law of nature; and if this also is true, we are certainly forbidden by nature's law to wrong our neighbour. Now the first assumption is true; therefore the conclusion is likewise true. For that is an absurd position which is taken by some people, who say that they will not rob a parent or a brother for their own gain, but that their relation to the rest of their fellow-citizens is quite another thing. Such people contend in essence that they are bound to their fellow-citizens by no mutual obligations, social ties, or common interests. This attitude demolishes the whole structure of civil society.

Others again who say that regard should be had for the rights of fellow-citizens, but not of foreigners,[4] would destroy the universal brotherhood of mankind; and when this is annihilated, kindness, generosity, goodness, and

[4] See also the immediately succeeding rubric, "Foreigners."

justice must utterly perish; and those who work all this destruction must be considered as wickedly rebelling against the immortal gods. For they uproot the fellowship which the gods have established between human beings, and the closest bond of this fellowship is the conviction that it is more repugnant to nature for man to rob a fellow-man for his own gain than to endure all possible loss, whether to his property or to his person . . . or even to his very soul—so far as these losses are not concerned with justice; for this virtue is the sovereign mistress and queen of all the virtues.—*Ibid.*, III. vi. 26–28.

There is a distinction between private persons and states; for, granting that a private person may defend himself and his property, it is nevertheless impermissible for him to avenge himself or to reclaim his own property save through the judge. For if it were permissible for him to do so in a different manner, that is, if any person whatsoever were the judge of his own cause, it would not be possible to govern the world. For such [a state of affairs] would be contrary not only to divine law, but also to natural law.—Vitoria, *De bello,* art. I, § 3.[5]

A private individual is not bound to endure injury to his own interests in order to preserve a foreign State.—Vitoria, *De potestate ecclesiae,* no. 10.

A state ought not to be punished for a wrong committed by an individual citizen. . . . [But] the state, which knows because it has been warned, and which ought to prevent the misdeeds of its citizens, and through its jurisdiction can prevent them, will be at fault and guilty of a crime if it does not do so. . . .

A state is liable for such offences of its citizens as are not for the moment but are successive and continuous; but even then, only if it knew of them and could have prevented them.—Gentili, *De jure belli,* Book I, chap. xxi.

Foreigners[6]

To debar foreigners from enjoying the advantages of the city is altogether contrary to the laws of humanity.—Cicero, *De officiis* III. xi. 47.

To keep certain people out of the city or province as being enemies, or to expel them when already there, are acts of war.—Vitoria, *De Indis,* Sec. III, no. 2.

[5] Trans. in J. B. Scott, *The Spanish Origin of International Law,* Part I, pp. cxvi–cxvii.
[6] See also the rubric "Freedom of Travel and Trade," *infra,* p. 274.

Banishment is one of the capital forms of punishment. Therefore, it is unlawful to banish strangers who have committed no fault.—Vitoria, *De Indis,* Sec. III, no. 2.

A prince has no greater authority over foreigners than over his own subjects. But he may not draw his sword against his own subjects, unless they have done some wrong. Therefore, not against foreigners either.—Vitoria, *De iure belli,* no. 13.

The Spaniards have a right to travel into the lands in question [i.e., in the New World] and to sojourn there, provided they do no harm to the natives, and the natives may not prevent them. Proof of this may in the first place be derived from the law of nations (*ius gentium*), which either is natural law or is derived from natural law (*Inst.* I. ii. 1): "What natural reason has established among all nations is called the *ius gentium.*" For, congruently herewith, it is reckoned among all nations inhumane to treat visitors and foreigners badly without some special cause, while, on the other hand, it is humane and correct to treat visitors well; but the case would be different, if the foreigners were to misbehave when visiting other nations.—Vitoria, *De Indis,* Sec. III, no. 2.

The laws of one country cannot bind [the citizens of] other countries, nor deprive aliens of their rights of ownership.—Suárez, *De bello,* sec. VII, no. 9.

If there are among the Indians any things which are treated as common both to citizens and to strangers, the Indians may not prevent the Spaniards from a communication and participation in them. If, for example, other foreigners are allowed to dig for gold in the land of the community or in rivers, or to fish for pearls in the sea or in a river, the natives cannot prevent the Spaniards from doing this, but they have the same right to do it as others have, so long as the citizens and indigenous population are not hurt thereby. This is proved by my first and second propositions. For if the Spaniards may travel and trade among them, they may consequently make use of the laws and advantages enjoyed by all foreigners.—Vitoria, *De Indis,* Sec. III, no. 4.

It is an apparent rule of the *ius gentium* that foreigners may carry on trade, provided they do no hurt to citizens.—*Ibid.,* no. 3.

As for the foreigner or the resident alien, it is his duty to attend strictly to

his own concerns, not to pry into other people's business, and under no condition to meddle in the politics of a country not his own.—Cicero, *De officiis* I. xxxiv. 125.

Strangers . . . have no license to alter the customs and institutions of foreign peoples.—Gentili, *De jure belli,* Book I, chap. xix.

The Nature of Power

The nature of power is twofold—public and private.—Vitoria, *De potestate civili,* no. 2.

Public power is of God and . . . it cannot be contained within the limits of man's nature or of any positive law.—*Ibid.,* no. 6.

All power—whether public or private—by which the secular State is governed, is not only just and legitimate, but is so surely ordained of God, that not even by the consent of the whole world can it be destroyed or annulled.—*Ibid.,* no. 1.

Civil or temporal power is that power which is directed towards a temporal end; while spiritual power is that which is directed towards a spiritual end.—Vitoria, *De potestate ecclesiae,* no. 8.

The governing power that resides in men flows either immediately from God, as in the case of spiritual power, or immediately from men themselves, as in the case of purely temporal power; but, in both instances, this power has been primarily given for the general good of the community; and therefore, that good should be held in view, in the process of lawmaking.—Suárez, *De legibus,* Book I, chap. vii, § 5.

Power is of two kinds, the one originates in the family . . . and this is a natural power; the other is civil for, although it may take its rise in nature and so may be said to be of natural law, . . . yet, man being a political animal, it is founded not on nature, but on law.—Vitoria, *De Indis,* Sec. II, no. 1.

The foundation of secular power is not grace, but nature; for man, since he is made in the image of God, and hence endowed with intellect and the use of reason, dominates, therefore, over the lower orders of creation. . . . But human nature remains in infidels, though grace is wanting, and therefore they may possess true temporal power.—Bellarmine, *De laicis* viii (Murphy trans., p. 38).

The State, then, possesses this [public] power by divine Disposition; but the material cause in which, by natural and divine law, power of this kind resides, is the State itself, which by its very nature is competent to govern and administer itself, and to order all its powers for the common good.—Vitoria, *De potestate civili,* no. 7.

Since by natural and divine law there must be a power for the government of the State, and since—if common, positive, and human laws are laid aside—there is no reason for depositing that power in one person rather than in another; it necessarily follows that the community is self-sufficing and that it has the power to govern itself.—*Ibid.*

Public power is the faculty, authority, or right to govern the civil State. . . . The State may in nowise be deprived of this power to protect itself and to guard against injury from its own citizens or from aliens, a function which it could not fulfil if there were no public powers; and consequently, if all the citizens should agree to dispense with these powers, in order that they might be bound by no law and that there should be no one to command, the agreement would be null and void, being contrary to natural law.—*Ibid.,* no. 10.

This may be said of power in general: When the supreme power in man coincides with the greatest wisdom and temperance, then the best laws and the best constitution come into being; but in no other way.—Plato, *Laws,* IV, p. 712.

Necessity for Public Authority

If therefore it is natural for men to live in society, it is necessary that there be among men someone by whom they may be governed, for if in a social group, each one is occupied with his own affairs, the group will be broken up unless there be some in it charged with the welfare of all.—St. Thomas Aquinas, *De regimine principum,* Book I, chap. i.

If all were equal, and subject to no power, each individual would draw away from the others in accordance with his own opinions and will; the commonwealth would of necessity be torn apart; and the State would be dissolved—unless there were some providential force to provide for the common welfare and consider the common good.—Vitoria, *De potestate civili,* no. 5.

Political rule is so natural and necessary to the human race that it cannot be withdrawn without destroying nature itself; for the nature of man is

such that he is a social animal; for indeed brutes are so endowed by nature that each is sufficient to himself, but man needs so many things that he can in no way live alone.—Bellarmine, *De laicis* v (Murphy trans., p. 20).

Political power considered in general, not descending in particular to Monarchy, Aristocracy, or Democracy, comes directly from God alone; for this follows of necessity from the nature of man, since that nature comes from Him Who made it; besides, this power derives from the natural law, since it does not depend upon the consent of men; for, willing or unwilling, they must be ruled over by some one, unless they wish the human race to perish, which is against a primary instinct of nature. But natural law is Divine law, therefore, government was instituted by Divine law.—*Ibid.*, vi (Murphy trans., pp. 24–25).

This [political] power resides, as in its subject, immediately in the whole state, for this power is by Divine law, but Divine law gives this power to no particular man, therefore Divine law gives this power to the collected body. Furthermore, in the absence of positive law, there is no good reason why, in a multitude of equals, one rather than another should dominate.—*Ibid.* (Murphy trans., p. 25).

For if—before men gathered together into a State—no one person was the superior of the others, it is in no way reasonable that in the assembly, or civil council, one individual should assume power over the others; especially not, in view of the fact that every man has by natural law the power and the right to defend himself, there being nothing more natural than to repel force by force.—Vitoria, *De potestate civili,* no. 7.

Truly, if human nature needs social life, certainly it also needs a rule and a ruler, for it is impossible for a multitude to hold together for any length of time unless there be one who governs it, and who is responsible for the common welfare.—Bellarmine, *De laicis* v (Murphy trans., p. 22).

For if councils and assemblies of men are necessary to the security of mortals, it is also true that no society can continue to exist without some force and power to govern and provide for it; the use and the utility of public power, and of the community, and of society are absolutely the same. —Vitoria, *De potestate civili,* no. 5.[7]

[7] In his lectures on St. Thomas Aquinas (*Francisco de Vitoria, O. P., Comentarios a la Secunda Secundae de Santo Tomás,* ed. by Vicente Beltrán de Heredia, Madrid, 1932–35), Vitoria added (*tomo* 2, p. 368): "In view of the fact that the state possesses unity by its very nature, and since man is a political and social animal, even granting that no prince is re-

It is consonant with natural reason that a human commonwealth should be subjected to some one, although (as we shall see) natural law has not, in and of itself, and without the intervention of human will, created political subjection.—Suárez, *De legibus,* Book III, chap. i, § 11.

It is impossible to conceive of a unified political body without political government or disposition thereto; since, in the first place, this unity arises in a large measure from subjection to one and the same rule and to some common superior power; while furthermore, if there were no such government, this body could not be directed towards one [common] end and the general welfare. It is, then, repugnant to natural reason to assume the existence of a group of human beings united in the form of a single political body, without postulating the existence of some common power which the individual members of the community are bound to obey; and therefore, if this power does not reside in any specific individual, it must necessarily exist in the community as a whole.—*Ibid.,* chap. ii, § 4.

The just authority of civil courts and parliaments is not therefore to be abolished, because sometime there is cunning used to frame them according to the private intents of men over-potent in the commonwealth.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. x. 14.

Vesting of Public Authority

The term "civil magistracy" signifies nothing more nor less than a man or number of men in whom resides the . . . power of governing a perfect community.—Suárez, *De legibus,* Book III, chap. i, § 5.

Since the State possesses power over its own parts, and since this power cannot be exercised by the multitude (which could not conveniently make laws and issue edicts, settle disputes and punish transgressors), it has therefore been necessary that the administration of the State should be entrusted to the care of some person or persons (and it matters not whether this power is entrusted to one or to many).—Vitoria, *De potestate civili,* no. 8.

. . . Efficient power to establish, or elect, the executive agent pertains to the legislator, that is to say, to the whole body of citizens, just as . . . the

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quired for the government of a political community (*civitatem*)—at least it is needful that there shall be certain persons set in authority and certain rulers for the [various] cities (*civitatum*), who are concerned with the common welfare, just as each individual is concerned with his own welfare. For it would be impossible that these other individuals should endure unless this were so, [that is,] unless they set up among themselves certain persons to whom they would be subject in order that affairs might be justly conducted."

legislative function pertains to that same body; furthermore, any diminution of the executive power, and even any deposition therefrom (if such a step should be expedient for the common welfare), are likewise functions proper to the legislator. . . . But the manner of agreeing upon the aforesaid establishment, or election, may perhaps vary with a variety of countries. Nevertheless, whatever these variations may be, the following requirement must be observed in every case, namely, that this election, or establishment, shall always be brought about by the authority of the legislator, that legislator being (as we have repeatedly observed) the whole body of citizens or the preponderant part thereof.—Marsiglio of Padua, *Defensor pacis, Dictio* I, chap. xv, sec. 2.

. . . It becomes necessary to designate . . . the effective cause that establishes and determines the remaining offices or parts of the state. We say, indeed, that this cause, in its primary form, is the legislator; but that, in its secondary form—which is, in a sense, instrumental, or administrative—it is the executive, acting through the legislator's authority as granted by the latter to the executive, and conforming to the pattern laid down for the said [executive] by that same [legislator]; namely, [the pattern of] law, which should invariably be followed [by the executive] in transacting and regulating civil acts to the extent of the latter's ability. . . . For though the legislator, as the primary and proper cause, must determine what persons shall fittingly exercise what kind of functions within the state, nevertheless, the [actual] execution of the said provisions, like that of other legal precepts, is enjoined and (if necessary) restrained by the executive agent. For the execution of legal provisions is more conveniently carried out through the executive[8] than through the whole body of citizens, inasmuch as one individual executive, or a few such persons, suffice for this task, in which the whole community (troubled, moreover, with other and unavoidable labors) would be futilely engaged. Indeed, the community as a whole also performs the task in question when the aforesaid executive agents perform it, since they do so in accordance with the decision (incorporated, that is to say, in law) of the community. Furthermore, these few executives, or one such person, can more readily execute such legal precepts as have already been brought into existence.—*Ibid.*, sec. 4.

By the . . . natural law, . . . power [to preserve itself] is delegated by the multitude to one or several, for the State cannot of itself exercise this power,

[8] *Ipsum;* one would expect *ipsam*, referring grammatically to *pars principans*, but the context leaves little room for doubt as to the logical antecedent, and the Latin of Marsiglio is not Ciceronian.

therefore, it is held to delegate it to some individual, or to several.—Bellarmine, *De laicis* vi (Murphy trans., pp. 26–27).

The power of the State is established by God and by natural law, so of a surety we must say the same of all kingly power; . . . for the power of self-government exists in the State . . . and the kings who rule over States are appointed to exercise this power.—Vitoria, *De potestate civili*, no. 8.

The power of the prince is derived from the state.[9]—Vitoria, *De bello*, art. I, no. 3.[10]

[If] the prince should chance to be so negligent in avenging or defending the state as to cause public and very grave harm to that state, . . . in such a case, the commonwealth as a whole could take vengeance and deprive the sovereign of the authority in question. For the state is always regarded as retaining this power within itself, if the prince fails in his duty.—Suárez, *De bello*, sec. II, no. 1.

If the state be a perfect one, it has power against its own king, even when the latter rules also over other kingdoms. But the case is otherwise if the state be an imperfect one, and a portion of one kingdom; for then nothing can be done without the consent of the whole. All the foregoing statements, since they are founded upon natural law, are applicable to both Christians and unbelievers.—*Ibid.*, no. 4.

The State as a whole may rightfully be punished for the sin of the monarch.—Vitoria, *De potestate civili*, no. 12.

A man's deputy, in so far as he is a deputy, is not of coördinate power with him, because no one can bestow what does not belong to him. Princely authority belongs to a prince only for his employment, since no prince can authorize himself; he has power to receive and to reject it, but no power to

[9] In his lectures on St. Thomas Aquinas (Beltrán de Heredia, *op. cit.*, tomo 5, p. 212), Vitoria expounded this conception at greater length: "In so far as relates to civil power, I hold that all power of this kind is derived from the commonwealth; that is to say, civil magistrates, rulers and princes have no authority nor power in excess of that which the commonwealth has given and conceded to them. Upon this assertion there follows a corollary, namely: subjects are bound to obey their superiors in those matters with respect to which the commonwealth has endowed them with power, and in the manner decreed by that commonwealth. For example, if the latter elects a king on the specific condition that he may exact certain tributes and taxes but no others, and if in his exactions he exceeds these limits, the subjects are under no obligation whatsoever to obey him, inasmuch as all power possessed by him is derived from the commonwealth."

[10] Trans. in J. B. Scott, *op. cit.*, p. cxvi.

create it in another, seeing that the creation of a prince is not effected by a prince. If this is true, it is evident that no prince can substitute for himself a regent equal in all things to himself.—Dante, *De monarchia* III. vii. 4.

The state . . . has complete power to avenge itself, to recover its own property, and to punish its enemies. . . . If the state had not this power, there would be disorder in the world, and injury would be suffered at the hands of the wicked. . . . With respect to these three points,—namely, avenging itself upon its enemies, recovering its property, and punishing its enemies,—the state possesses the same power over its enemies as that which it possesses over its subjects. And if the state has this power, so also has the prince; for he draws his power from the state.—Vitoria, *De bello,* art. I, no. 3.[11]

Since—as is evident from the very beginning and before such an event actually took place—the human race did at one time possess this power (namely, the power to elect a monarch), we must conclude that it is still able to do so; for the power of which we speak, being derived from natural law, does not pass away.—Vitoria, *De potestate civili,* no. 14.[12]

If a free people chooses the men to whom it is to entrust its fortunes, and, since it desires its own safety, chooses the best men, then certainly the safety of the State depends upon the wisdom of its best men, especially since Nature has provided not only that those men who are superior in virtue and in spirit should rule the weaker, but also that the weaker should be willing to obey the stronger.—Cicero, *De re publica* I. xxxiv. 51.

Without . . . consent there was no reason that one man should take upon him to be lord or judge over another; because, although there be according to the opinion of some very great and judicious men a kind of natural right in the noble, wise, and virtuous, to govern them which are of servile disposition; nevertheless for manifestation of this their right, and men's more peaceable contentment on both sides, the assent of them who are to be governed seemeth necessary.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. x. 4.

[11] Trans. in J. B. Scott, *op. cit.,* p. cxvii.

[12] In his lectures on St. Thomas Aquinas (Beltrán de Heredia, *op. cit., tomo* 2, p. 278) Vitoria stated that "in case a king is deprived of his kingdom because of the sin of schism, . . . the Pope may not appoint a new king, but . . . on the contrary, this function pertains to the state, which derives from natural law the right to do this, namely, to set up a king for itself."

Sith men naturally have no full and perfect power to command whole politic multitudes of men, therefore utterly without our consent we could in such sort be at no man's commandment living. And to be commanded we do consent, when that society whereof we are part hath at any time before consented, without revoking the same after by the like universal agreement.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. x.

It depends on the consent of the people to decide whether kings, or consuls, or other magistrates are to be established in authority over them; and, if there be legitimate cause, the people can change a kingdom into an aristocracy, or an aristocracy into a democracy, and vice versa, as we read was done in Rome.—Bellarmine, *De laicis* vi (Murphy trans., p. 27).

[In a] revolution . . . arise two sorts of changes in governments; the one affecting the constitution, when men seek to change from an existing form into some other, for example, from democracy into oligarchy, and from oligarchy into democracy, or from either of them into constitutional government or aristocracy, and conversely; the other not affecting the constitution, when, without disturbing the form of government, whether oligarchy, or monarchy, or any other, they try to get the administration into their own hands.—Aristotle, *Politics,* V. i. 8.

Nature and Kinds of Government

The form of government is best in which every man, whoever he is, can act for the best and live happily.—*Ibid.,* VII. ii. 5.

For the State has the power of self-government, and the act of the greater part is the act of the whole; therefore, the State may accept the form of government that it desires, even if this be not the best form.—Vitoria, *De potestate civili,* no. 14.

Do you know, I said, that governments vary as the dispositions of men vary, and that there must be as many of the one as there are of the other? For we cannot suppose that States are made of "oak and rock," and not out of the human natures which are in them, and which in a figure turn the scale and draw other things after them?

Yes, he [Glaucon] said, the States are as the men are; they grow out of human characters.—Plato, *Republic,* VIII, p. 544.

Of forms of government in which one rules, we call that which regards the common interests kingship or royalty; that in which more than one,

but not many, rule, aristocracy [the rule of the best]; and it is so called, either because the rulers are the best men, or because they have at heart the best interests of the state and of the citizens. But when the citizens at large administer the state for the common interest, the government is called by the generic name,—a constitution [πολιτεία]. . . . Of the above-mentioned forms, the perversions are as follows: of royalty, tyranny; of aristocracy, oligarchy; of constitutional government, democracy. For tyranny is a kind of monarchy which has in view the interest of the monarch only; oligarchy has in view the interest of the wealthy; democracy, of the needy: none of them the common good of all.—Aristotle, *Politics,* III. vii. 3, 5.

The end of democracy is liberty, of oligarchy wealth, of aristocracy things relating to education and what the law prescribes, . . . of tyranny self-protection [of the tyrant].—Aristotle, *The "Art" of Rhetoric,* I. viii. 5.

Tyranny . . . is monarchy exercising the rule of a master over political society.—Aristotle, *Politics,* III. viii. 2.

Every people, . . . every city, which is an orderly settlement of a people, every commonwealth, which, as I have said, is "the property of a people," must be governed by some deliberative body if it is to be permanent. And this deliberative body must, in the first place, always owe its beginning to the same cause as that which produced the State itself. In the second place, this function must either be granted to one man, or to certain selected citizens, or must be assumed by the whole body of citizens. And so when the supreme authority is in the hands of one man, we call him a king, and the form of this State a kingship. When selected citizens hold this power, we say that the State is ruled by an aristocracy. But a popular government (for so it is called) exists when all the power is in the hands of the people. . . . any one of these three forms of government (if only the bond which originally joined the citizens together in the partnership of the State holds fast), though not perfect or in my opinion the best, is tolerable, though one of them may be superior to another. For either a just and wise king, or a select number of leading citizens, or even the people itself, though this is the least commendable type, can nevertheless, as it seems, form a government that is not unstable, provided that no elements of injustice or greed are mingled with it.—Cicero, *De re publica* I. xxvi. 41–2.

It is by no means every monarchy which we can call straight off a kingship, but only that which is voluntarily accepted by the subjects and where they are governed rather by an appeal to their reason than by fear and

force. Nor again can we style every oligarchy an aristocracy, but only that where the government is in the hands of a selected body of the justest and wisest men. Similarly that is no true democracy in which the whole crowd of citizens is free to do whatever they wish or purpose, but when, in a community where it is traditional and customary to reverence the gods, to honour our parents, to respect our elders, and to obey the laws, the will of the greater number prevails, this is to be called a democracy.—Polybius, *The Histories,* VI, chap. 4. 2–5.

The true forms of government . . . are those in which the one, or the few, or the many, govern with a view to the common interest; but governments which rule with a view to the private interest, whether of the one, or of the few, or of the many, are perversions. For citizens, if they are truly citizens, ought to participate in the advantages of a state.—Aristotle, *Politics,* III. vii. 2.

Under a democracy each man has his share of just and equal rights.—Demosthenes, *Against Meidias,* § 67.

In a democracy there must never be a citizen so powerful that his support can ensure that the one party submits to outrages and the other escapes punishment.—*Ibid.,* § 207.

All should take some share in the government: for this form of constitution ensures peace among the people, commends itself to all, and is most enduring, as stated in *Polit.* ii. 6.—St. Thomas Aquinas, I.–II, qu. 105, art. 1.

Governments, which have a regard to the common interest, are constituted in accordance with strict principles of justice, and are therefore true forms; but those which regard only the interest of the rulers are all defective and perverted forms, for they are despotic, whereas a state is a community of freemen.—Aristotle, *Politics,* III. vi. 11.

If the people would maintain their rights, . . . no form of government would be superior [to the democratic form], either in liberty or happiness, for they themselves would be masters of the laws and the courts, of war and peace, of international agreements, and of every citizen's life and property; this government alone . . . can rightly be called a commonwealth, that is, "the property of the people." And it is for that reason . . . that "the property of the people" is often liberated from the domination of kings or senators, while free peoples do not seek kings or the power and wealth of aristocracies.—Cicero, *De re publica* I. xxxii. 48.

Constitutional rule is a government of freemen and equals.—Aristotle, *Politics,* I. vii. 1.

Aim and Purpose of Government

A state which would be safe and happy, as far as the nature of man allows, must and ought to distribute honor and dishonor in the right way. And the right way is to place the goods of the soul first and highest in the scale, always assuming temperance to be the condition of them; and to assign the second place to the goods of the body; and the third place to money and property. And if any legislator or state departs from this rule by giving money the place of honor, or in any way preferring that which is really last, may we not say, that he or the state is doing an unholy and unpatriotic thing?—Plato, *Laws,* III, p. 697.

In estimating the goodness of a state, we regard both the situation of the country and the order of the laws, considering that the mere preservation and continuance of life is not the most honorable thing for men, as the vulgar think, but the continuance of the best life, while we live.—*Ibid.,* IV, p. 707.

Men think that what is just is equal; and that equality is the supremacy of the popular will; and that freedom and equality mean the doing what a man likes. . . . But this is all wrong; men should not think it slavery to live according to the rule of the constitution; for it is their salvation.—Aristotle, *Politics,* V. ix. 15.

Governments are constituted, not for the advantage of any individual, but for that of the community.—Gentili, *De jure belli,* Book III, chap. xii.

The chief purpose in the establishment of constitutional state and municipal governments was that individual property rights might be secured. For although it was by Nature's guidance that men were drawn together into communities, it was in the hope of safeguarding their possessions that they sought the protection of cities.—Cicero, *De officiis* II. xxi. 73.

It is certainly not the part of a well-established and powerful government without good cause to alter and divide what has for a long time been settled and confirmed, as the strength of an empire does not depend upon a multitude of words, but upon the faithful and just administration of affairs.—*Constitutions of Justinian,* Fourth Collection, VII, Preface.

Those things are subject to human government, which can be done by man; but what pertains to the nature of man is not subject to human

government; for instance, that he should have a soul, hands, or feet.—St. Thomas Aquinas, I.–II, qu. 93, art. 4.

Will of the Majority

What is done by the majority of an assembly is considered to be the same as if it had been done by all.—*Digest* L. i. 19.

Anything which is done publicly by a majority is considered to have been done by all the parties interested.—*Ibid.*, xvii. 160, § 1.

It suffices, then, in order to do anything legitimately, that the majority should agree on the course in question.—Vitoria, *De potestate civili*, no. 14.

In matters touching the good of the State the decisions of the majority bind even when the rest are of a contrary mind; otherwise naught could be done for the welfare of the State, it being difficult to get all of the same way of thinking.—Vitoria, *De Indis*, Sec. III, no. 16.

In every community the consent of a majority thereof is usually sufficient for the validity of its acts in matters where law has not made some special provision. . . . [To] explain in what manner the computation of this "greater portion" should be made, or of what persons it must be composed . . . there should be reckoned in this number only such persons as can give consent to a consuetudinary law. All infants are, therefore, excluded, and all persons mentally defective. Some would also entirely exclude women on the ground that they can exercise no legislative authority. Among men, they exclude all below the age of twenty-five years. However, I cannot find any basis in law or any justification in reason for the exclusion of the last two groups. —Suárez, *De legibus*, Book VII, chap. ix, §§ 13, 14.

Lèse Majesté

The crime of lèse majesté is committed against the Roman people, or against their safety, and he is guilty of it by whose agency measures are maliciously taken for the death of hostages, without the order of the Emperor; or when men armed with weapons or stones appear in the city, or are assembled against the State, and occupy public places or temples; or where assemblies have been called together, or men convoked for sedition; or where, by the malicious aid and advice of anyone, plans have been formed by which the magistrates of the Roman people, or other officials invested with command or authority may be killed; or where anyone bears arms against the government, or sends a messenger or letter to the enemies

of the Roman people, or communicates to them any password; or commits any act with malicious intent by means of which the enemies of the Roman people may be assisted in their designs against the government; or where anyone solicits or inflames soldiers, in order that a sedition or a tumult may be excited against the State.—*Digest* XLVIII. iv. 1, § 1.

He can be accused of lèse majesté by whose aid, advice, or malicious contrivance a province or a city has been delivered to the enemy.—*Ibid.*, 10.

The Qualifications and Duties of the Chief Magistrate

Until philosophers are kings, or the kings and princes of this world have the spirit and power of philosophy, and political greatness and wisdom meet in one, and those commoner natures who pursue either to the exclusion of the other are compelled to stand aside, cities will never have rest from their evils,—no, nor the human race, as I believe,—and then only will this our State have a possibility of life and behold the light of day.—Plato, *Republic,* V, p. 473.

When, therefore, I considered . . . the type of men who were administering the affairs of State, with their laws too and their customs, the more I considered them and the more I advanced in years myself, the more difficult appeared to me the task of managing affairs of State rightly.—Plato, Epistle VII, p. 325c d.

The State in which the rulers are most reluctant to govern is always the best and most quietly governed, and the State in which they are most eager, the worst.—Plato, *Republic,* VII, p. 520.

Even though the multitude may be utterly deceived, subsequently it usually hates those who have led it to do anything improper.—Aristotle, *Athenian Constitution,* xxviii. 3–4.

It seems advisable, that we should no longer have a single man to rule over us—the rule of one is neither good nor pleasant. Ye cannot have forgotten to what lengths Cambyses went in his haughty tyranny, and the haughtiness of the Magi ye have yourselves experienced. How indeed is it possible that monarchy should be a well-adjusted thing, when it allows a man to do all he likes without being answerable? Such licence is enough to stir strange and unwonted thoughts in the heart of the worthiest of men. Give a person this power, and straightway his manifold good things puff him up with pride, while envy is so natural to human kind that it cannot

but arise in him. But pride and envy together include all wickedness; both leading on to deeds of savage violence. True it is that kings, possessing as they do all that heart can desire, ought to be void of envy, but the contrary is seen in their conduct towards the citizens. They are jealous of the most virtuous among their subjects, and wish their death; while they take delight in the meanest and basest, being ever ready to listen to the tales of slanderers. A king, besides, is beyond all other men inconsistent with himself. Pay him court in moderation, and he is angry because you do not show him more profound respect—show him profound respect, and he is offended again, because (as he says) you fawn on him. But the worst of all is, that he sets aside the laws of the land, puts men to death without trial, and subjects women to violence. The rule of the many, on the other hand, has, in the first place, the fairest of names, to wit, isonomy; and further it is free from all those outrages which a king is wont to commit. There, places are given by lot, the magistrate is answerable for what he does, and measures rest with the commonalty. I vote, therefore, that we do away with monarchy, and raise the peoples to power. For the people are all in all.—*The History of Herodotus:* "Speech of the Persian Otanes after the Overthrow of the Magians," Book III, chap. 80.

That vertue . . . perhappes among all the matters that belong unto man, is the cheeffest and rarest, that is to say, the maner and way to rule and to reigne in the right kinde. Which alone were sufficient to make men happie, and to bring once again into the worlde the golden age, whiche is written to have bine whan Saturnus reigned in the olde time.—Castiglione, *The Courtier* (Hoby trans., p. 310).

And whatever the wise rulers do, they can commit no error, so long as they maintain one great principle and by always dispensing absolute justice to them with wisdom and science are able to preserve the citizens and make them better than they were, so far as that is possible.—Plato, *The Statesman,* p. 297A B.

But he does not rule who does not correct. Therefore the name of king is held by doing rightly; by sinning, it is lost. Whence indeed, according to the ancients, the proverb thus ran: "You shall be king, if you do rightly; if you do not do [rightly] you shall not [be king]." The royal virtues are especially two: justice and mercy (*pietas*). But mercy is more to be praised in kings; for justice by itself is harsh.—Isidore, *Etymologies,* Book IX, chap. iii, §§ 4–5.

That is profitable care on the part of officials, that is praiseworthy caution, in which reason motivates the whole act, and emotion plays no part. Power must be restrained under reason, nor ought anything be undertaken before the excited mind has returned to calm. For in time of excitement [the mind] thinks everything it does is just.—Gratian, *Decretum,* Part II, cau. xi, qu. iii, can. lxvii, citing Gregory the Great, *Letters,* Book VIII, letter xii, "To Guidiscalus."

The fortune of any people is . . . a fragile thing . . . when it depends on the will or the character of one man.—Cicero, *De re publica* II. xxviii. 50.

Temporal power, by which one man is raised above others, is not in accordance with nature, but is the consequence of sin. Great weakness is inherent in such power, which is of short duration; it appears to consist of high position and authority, although it is rather a matter of submission and service; the honor [accompanying it] is contemptible, and it is full of dangers, of troubles, of worry and vexation.—St. Thomas Aquinas, *De eruditione principum,* Book I, chap. i.

Power is a heavy burden: he is indeed weighed down who bears upon his shoulders a city, a province, or a kingdom.—*Ibid.*

Wisdom is very necessary to those possessing temporal power.—*Ibid.*, chap. ii.

The good ruler is a good and wise man, and . . . he who would be a statesman must be a wise man.—Aristotle, *Politics,* III. iv. 7.

There are three qualifications required in those who have to fill the highest offices,—(1) first of all, loyalty to the established constitution; (2) the greatest administrative capacity; (3) virtue and justice of the kind proper to each form of government.—Aristotle, *Politics,* V. ix. 1.

The prince derives his authority from the State. Therefore he ought to use it for the good of the State.—Vitoria, *De iure belli,* no. 12.

Those who propose to take charge of the affairs of government should not fail to remember two of Plato's rules: first, to keep the good of the people so clearly in view that regardless of their own interests they will make their every action conform to that; second, to care for the welfare of the whole body politic and not in serving the interests of some one party

to betray the rest. For the administration of the government, like the office of a trustee, must be conducted for the benefit of those entrusted to one's care, not of those to whom it is entrusted.—Cicero, *De officiis* I. xxv. 85.

It is . . . peculiarly the place of a magistrate to bear in mind that he represents the state and that it is his duty to uphold its honor and its dignity, to enforce the law, to dispense to all their constitutional rights, and to remember that all this has been committed to him as a sacred trust.—*Ibid.*, xxxiv. 124.

The function of a magistrate is to govern, and to give commands which are just and beneficial and in conformity with the law. For as the laws govern the magistrate, so the magistrate governs the people, and it can truly be said that the magistrate is a speaking law, and the law a silent magistrate. Nothing, moreover, is so completely in accordance with the principles of justice and the demands of Nature (and when I use these expressions, I wish it understood that I mean Law) as is government, without which existence is impossible for a household, a city, a nation, the human race, physical nature, and the universe itself.—Cicero, *De legibus* III. i. 2–3.

For riches, names, and power, when they lack wisdom and the knowledge of how to live and to rule over others, are full of dishonor and insolent pride, nor is there any more depraved type of State than that in which the richest are accounted the best. But what can be nobler than the government of the State by virtue? For then the man who rules others is not himself a slave to any passion, but has already acquired for himself all those qualities to which he is training and summoning his fellows. Such a man imposes no laws upon the people that he does not obey himself, but puts his own life before his fellow-citizens as their law.—Cicero, *De re publica* I. xxxiv. 51–2.

They [Christian emperors] are happy if they rule justly; if they are not lifted up amid the praises of those who pay them sublime honors, and the obsequiousness of those who salute them with an excessive humility, but remember that they are men . . . if they are slow to punish, ready to pardon; if they apply that punishment as necessary to government and defence of the republic, and not in order to gratify their own enmity; if they grant pardon, not that iniquity may go unpunished, but with the hope that the transgressor may amend his ways; if they compensate with the lenity of mercy and the liberality of benevolence for whatever severity they may be compelled to decree; if their luxury is as much restrained as it might have

been unrestrained; if they prefer to govern depraved desires rather than any nation whatever.—St. Augustine, *De civitate dei* V. xxiv.

In the case of a prince, there is required a prudence that is political; that is to say, one that is constructive in relation to the building of laws.—Suárez, *De legibus,* Book I, chap. iv, § 6.

A good prince masters himself, serves his people, esteems lightly the life-blood of no man; if it is an enemy's, yet it is of one who may become a friend; if it is a criminal's, yet it is a human being's; whosesoever it may be, because he could not give it, he considers it a crime to take it away. Therefore its effusion is ever his confusion.—Seneca, *De clementia,* Book II: Fragment.

Upright governments have liberty as their aim, that men may live for themselves; not citizens for the sake of the consuls, nor a people for a king, but conversely, consuls for the sake of the citizens, and a king for his people. As governments are not all established for the sake of laws, but laws for governments, so those living under the laws are not ordered for the sake of the legislator, but rather he for them, as the Philosopher maintains in what he has left us concerning the present matter. Wherefore it is also evident that although consul or king may be lord of others with respect to means of governing, they are servants with respect to the end of governing. —Dante, *De monarchia* I. xii. 3.

The aim of him who rules should be this, namely, to safeguard the welfare of those whom he undertakes to govern. For it is the duty of a pilot, guiding his vessel through dangerous seas, to bring it safely into port. Moreover, the welfare and prosperity of the multitude forming a society depends on the safeguarding of its unity, which is called peace, and without which social life would be futile, for truly a disputing multitude is divided against itself. Therefore the ruler of a multitude should seek above all to foster the unity of peace.—St. Thomas Aquinas, *De regimine principum,* Book I, chap. ii.

The unity . . . of the multitude, which is called peace, should be diligently preserved by the ruler. . . . Three things are necessary to promote the welfare of the multitude. The first is that it be established in the unity of peace. The second, that the multitude, united by the bond of peace, be guided toward good conduct. For just as a man can do nothing well without giving rise to the implication that the parts of his body act in unity so without the unity of peace a multitude of men, struggling with one another, are kept

from good conduct. Thirdly, it is certainly required that through the ruler's diligence there be available that adequate authority which is essential for [the common] welfare. Thus, it being the duty of the ruler to bring about the welfare of the multitude [in the first place], he should in consequence devote himself to the [subsequent] preservation of that welfare.

There are also three things which interfere with the maintenance of the public good, one of which, indeed, springs from nature. For the welfare of the multitude ought not to be brought about for a certain time only, but should be developed in such a way that it will be lasting. Since men are mortal, however, their lives cannot be of long duration. Nor, while they live, are they always of the same vigor, because human life is subject to many variations, and so men are not equally capable throughout their lives of performing the same duties.

A second and innate obstacle to the preservation of the public good consists in perversity of wills. As long as people are either slothful in accomplishing that which the state needs, or are in addition guilty of injury to the peace of the multitude, so long do they disturb the peace of others by transgressing justice.

A third obstacle to the preservation of a nation arises from exterior causes, as when peace is destroyed in consequence of a hostile attack, sometimes resulting in the overthrow of the governing power, or in the complete destruction of the state. Therefore against these three obstacles the king should exercise a threefold care. First of all as regards the matter of men succeeding one another, . . . he should seek to preserve the welfare of his subjects by exercising great care with respect to the filling of vacant offices; and secondly, by his laws and precepts, by punishments and rewards, he should restrain from injustice those who are subjected to him, and persuade them to virtuous conduct. . . . Thirdly, the king should take care that the multitude governed by him is protected against enemies. For it is of little advantage to avoid interior dangers if those from without cannot be warded off.—St. Thomas Aquinas, *De regimine principum,* Book I, chap. xv.

The king must take great care fully to protect justice and reason and rectitude in his kingdom, not only in the case of persons born in his realm, but also in the case of travellers and strangers and those who come from foreign lands.—Egidio Colonna, *Li Livres du gouvernement des rois,* Book I, Part II, chap. xi.

Political Justice means justice as between free and (actually or proportionately) equal persons, living a common life for the purpose of satisfying

their needs. Hence between people not free and equal political justice cannot exist, but only a sort of justice in a metaphorical sense. For justice can only exist between those whose mutual relations are regulated by law, and law exists among those between whom there is a possibility of injustice, for the administration of the law means the discrimination of what is just and what is unjust. . . . This is why we do not permit a man to rule, but the law, because a man rules in his own interest, and becomes a tyrant; but the function of a ruler is to be the guardian of justice, and if of justice, then of equality. A just ruler seems to make nothing out of his office; for he does not allot to himself a larger share of things generally good, unless it be proportionate to his merits; so that he labors for others, which accounts for the saying . . . that "Justice is the good of others." Consequently some recompense has to be given him, in the shape of honor and dignity. It is those whom such rewards do not satisfy who make themselves tyrants.—Aristotle, *Nicomachean Ethics,* V. vi. 4–7.

Even as in the firmamente the sonne and the moone and the other starres show to the world (as it were) in a glasse a certeine likenesse of God: so uppon the earth a muche more liker image of God are those good Princis that love and woorshippe him, and showe unto the people the cleere light of his justice, accompanied with a shadowe of the heavenlye reason and understandinge: and such as these be doeth God make partners of his true dealing, righteousnesse, justice and goodnesse, and of those other happy benifittes which I can not name, that disclose unto the worlde a much more evident proof of the Godhead, then doeth the light of the sonne, or the continuall tourninge of the firmamente with the sundrye course of the starres. It is God therfore that hath appointed the people under the custodie of Princis, which ought to have a diligent care over them, that they may make him accompt of it, as good stewardes do their Lord, and love them and thinke their owne, all the profit and losse that happeneth to them, and principally above all thing provide for their good astate and welfare. Therfore ought the prince not only to be good, but also to make others good, like the Carpenters square, that is not only straight and just it self, but also maketh straight and just whatsoever it is occupied about.—Castiglione, *The Courtier* (Hoby trans., pp. 314–15).

Of cares beelonging to a Prince, the cheeffest is of justice: for maintenance wherof wise and well tryed men shoulde be chosen out for officers, whose wisdome were verie wisdome in deede, accompanied with goodnesse, for elles is it no wisdome, but craft. And where there is a want of this good-

nesse, alwayes the art and subtill practise of lawyers is nothing elles, but the uttre decay and destruction of the lawes and judgements; and the fault of every offence of theirs is to be layed in him that put them in office.—Castiglione, *The Courtier* (Hoby trans., p. 322).

The greatest proofe that the Prince is good, is whan the people are good: bicause the lief of the Prince is a lawe and ringleader of the Citizins, and upon the condicions of him must needes al others depende; neyther is it meete for one that is ignorant, to teach; nor for him that is out of order, to give order: nor for him that falleth, to help up an other. Therfore if the Prince will execute these offices aright, it is requisit that he apply all his studie and diligence to get knowleage, afterward to facion within him selfe and observe unchangeablye in everye thinge the lawe of reason, not written in papers, or in mettall, but graven in his owne minde, that it maye be to him alwayes not onlie familiar, but inwarde, and live with him, as a pereell of him: to the intent it may night and day, in everye time and place admonish him and speake to him within his hart.—*Ibid* (p. 315).

It [is] also the office of a good Prince so to trade his people and with such lawes and statutes, that they maye lyve in rest and in peace, without daunger and with encrease of welth, and injoye praisablye this ende of their practises and actions, which ought to be quietnesse. Bicause there have bine often times manye Commune weales and Princis, that in warr were alwayes most florishinge and mightie, and immediatelye after they have had peace, fell in decaye and lost their puissance and brightnesse, like yron unoccupied. And this came of nothing elles, but bicause they had no good trade of lyving in peace, nor the knowleage to injoie the benifit of ease. And it is not a matter lawfull to be alwayes in warr without seekinge at the ende to come to a peace: Although some Princis suppose that their drift ought principally to be, to bringe in subjection their borderers, and therfore traine up their people in a warlyke wyldenesse of spoyle, and murther, and suche matters: they wage them to exercise it, and call it vertue.—*Ibid* (p. 318).

I woulde counsell the Prince to do his best to preserve his subjectes in quiet astate, and to give them the gooddes of the mynde, and of the bodye and of fortune: but them of the bodye and of fortune, that they maye exercise them of the minde.—*Ibid.* (p. 325).

Not the multytude of Subjectes, but the woorthynesse of them makes Princis greate.—*Ibid.* (p. 326).

Perhappes there can not be a greater praise nor more comlye for a Prince, then to call him a good Governour.—*Ibid.* (p. 331).

Althoughe the heavens be so scante in bringinge furth excellent Princis, that in so manye hundredth yeeres we do scantlye see one, yet may this good lucke happen to us.—*Ibid.* (p. 332).

It is a statement worthy of the majesty of a reigning prince for him to profess to be subject to the laws; . . . indeed, it is the greatest attribute of imperial power for the sovereign to be subject to the laws.—*Code* I. xiv. 4.

The sovereign is said to be *exempt from the law,* as to its coercive power. —St. Thomas Aquinas, I.–II, qu. 96, art. 5, ad 3.

It is just that a Prince obey his own laws. For it will then appear that his laws ought to be kept by all, when he himself shows reverence for them. Princes are bound by their own laws, nor is it fitting in itself that they should be able to reject laws which they set up over their subjects. For the authority of their voice is just, if they do not suffer themselves to do what they forbid their people.—Gratian, *Decretum,* Part I, dist. ix, can. ii, citing Isidore, *Sententiae,* Book III, chap. liii.[13]

It is said that the prince is absolved from the obligations of the law; but this is not true in the sense that it is lawful for him to do unjust acts, but only in the sense that his character should be such as to cause him to practice equity not through fear of the penalties of the law but through love of justice; and should also be such as to cause him from the same motive to promote the advantage of the commonwealth, and in all things to prefer the good of others before his own private will. Who, indeed, in respect of public matters can properly speak of the will of the prince at all, since therein he may not lawfully have any will of his own apart from that which the law or equity enjoins, or the calculation of the common interest requires?—John of Salisbury, *Policraticus* IV. ii.

Not only do I withdraw from the hands of rulers the power of dispensing with the law, but in my opinion those laws which carry a perpetual injunction or prohibition are not subject at all to their pleasure. In the case of those rules which are flexible, I admit a power of dispensing with verbal strictness; but only provided that the purpose of the law is preserved in its integrity by a compensating concession made to propriety or public utility.—*Ibid.,* vii.

[13] Migne finds this reference in Book III, chap. li.

Ech man woulde willinglye obey the lawes, whan they shoulde see him [the Prince] to obey them him selfe, and bee (as it were) an uncorrupted keaper and minister of them.—Castiglione, *The Courtier* (Hoby trans., p. 324)

However much a prince may be freed from the yoke of the law, yet all kings and princes (as Pindar said) are subject to the law of nature; and ample as the power of a prince may be, yet it does not extend to acts of injustice.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. vii, § 8.

The theologians are mistaken and the jurists flatter, when they maintain that everything is allowed to princes and that they have supreme and unrestricted power.—Gentili, *De jure belli,* Book III, chap. xv.

When there has been a contest for power, those who gain the upper hand so entirely monopolize the government, as to refuse all share to the defeated party and their descendants—they live watching one another, the ruling class being in perpetual fear that some one who has a recollection of former wrongs will come into power and rise up against them. Now, according to our view, such governments are not polities at all, nor are laws right which are passed for the good of particular classes and not for the good of the whole state. States which have such laws are not polities but parties, and their notions of justice are simply unmeaning. . . . We must not entrust the government in your state to any one because he is rich, or because he possesses any other advantage, such as strength, or stature, or again birth: but he who is most obedient to the laws of the state, he shall win the palm; and to him who is victorious in the first degree shall be given the highest office and chief ministry of the gods; and the second to him who bears the second palm; and on a similar principle shall all the other offices be assigned to those who come next in order. And when I call the rulers servants or ministers of the law, I give them this name not for the sake of novelty, but because I certainly believe that upon such service or ministry depends the well- or ill-being of the state. For that state in which the law is subject and has no authority, I perceive to be on the highway to ruin; but I see that the state in which the law is above the rulers, and the rulers are the inferiors of the law, has salvation, and every blessing which the Gods can confer.—Plato, *Laws,* IV, p. 715.

Although the act of creating the law be voluntary on the part of the king; nevertheless, the fact that he is thereby bound or not bound, does not de-

pend upon his own will: just as in the case of pacts; for he who enters into a pact of his own free will, is nevertheless bound thereby.—Vitoria, *De potestate civili,* no. 21.

A prince who makes a contract with his subjects is bound to them by natural law, by the law of nations, and by the civil law. Agreements which are informed with natural justice and equity must be kept by the very greatest ruler, even when made with his own subjects.—Gentili, *De jure belli,* Book III, chap. xvi.

Human glory is . . . an unworthy recompense for the high office of king. —St. Thomas Aquinas, *De regimine principum,* Book I. chap. viii.

A kingdom is the best form of government of the people, so long as it is not corrupt. But since the power granted to a king is so great, it easily degenerates into tyranny, unless he to whom this power is given be a very virtuous man: for it is only the virtuous man that conducts himself well in the midst of prosperity, as the Philosopher observes (*Ethic.* iv. 3). Now perfect virtue is to be found in few.—St. Thomas Aquinas, I.–II, qu. 105, art. 1, ad 2.

Above all every state should be so administered and so regulated by law that its magistrates cannot possibly make money.—Aristotle, *Politics,* V. viii. 15.

A prince ought to subordinate both peace and war to the common weal of his State and not spend public revenues in quest of his own glory or gain, much less expose his subjects to danger on that account.—Vitoria, *De iure belli,* no. 12.[14]

The ruler of one State is not bound to further the welfare of another State—although the latter may be much the greater of the two—by any means which will be detrimental to his own State, and indeed, it is his duty not to do so.—Vitoria, *De potestate ecclesiae,* no. 10.

A king may not alienate his subjects, nor give them another king; for a people is free even though it be under a king.—Gentili, *De jure belli,* Book III, chap. xv.

[14] In his lectures on St. Thomas Aquinas (Beltrán de Heredia, *op. cit., tomo* 2, pp. 178–79), Vitoria further insists that "although it is true that the king is not bound to lose his entire estate in order to save the life of one man, nevertheless, he is bound to lose his estate [if that should be necessary] for the common welfare of the kingdom as a whole; and all the great men of the kingdom would be bound to do likewise [were it necessary] in order to succor the whole."

And as subjects may not make a contract to the prejudice of their superior, so a ruler may not form one to the prejudice of his subjects, since in this respect they are on an equality and are bound by mutual obligations.—Gentili, *De jure belli,* Book III, chap. xv.

Diligent care should be exercised that the multitude be provided with a king in such a way that it will not fall under tyrannical rule.

It is necessary in the first place that there be advanced to the kingship, by those to whom this duty belongs, a man of such qualities that he will be unlikely to fall into tyranny. . . . Hence the government of the kingdom should be established in such a way that opportunity is not afforded the king to set up a tyranny. Likewise his power should be so tempered that he cannot easily lapse into tyrannical excesses.—St. Thomas Aquinas, *De regimine principum,* Book I, chap. vi.

When . . . the power has been granted directly by men themselves, it is most evident that it has been granted not for the advantage of the prince but for the common good of those who have conferred it; and for this reason, kings are called the ministers of the state.—Suárez, *De legibus,* Book I, chap. vii, § 5.

Moreover, since [any] possession passes into the hands of a successor with its accompanying obligations, the conditions attaching to the kingly power when it was transmitted by the commonwealth to the first king, pass to his successors, so that they possess that power together with the original obligations.—*Ibid.,* Book III, chap. iv, § 3.

Between a tyrant and a prince there is this single or chief difference, that the latter obeys the law and rules the people by its dictates, accounting himself as but their servant. It is by virtue of the law that he makes good his claim to the foremost and chief place in the management of the affairs of the commonwealth and in the bearing of its burdens; and his elevation over others consists in this, that whereas private men are held responsible only for their private affairs, on the prince fall the burdens of the whole community.—John of Salisbury, *Policraticus* IV. i.

The Tyrant

Kings are called βασιλεῖς by the Greeks for this reason, because, like foundations, they support the people. Whence indeed, foundations have crowns. For the more power anyone is given, the more troubled he is to bear the burden. They are called tyrants in Greek. The same are called in Latin,

Kings. For no distinction was made by the ancients between a king and a tyrant, as Virgil shows (*Aenid,* Book VII, line 266):

> To me it shall be a term of the peace to have touched
> your sovereign's hand,
> (*Pars mihi pacis erit dextram tetigisse tyranni.*)

For strong kings are called tyrants. For *tiro* (a young soldier) is a strong man. Of these the Lord spoke, saying (Prov. 8:15—Douay version), "By me Kings reign and through me tyrants hold the earth."[15] Now afterwards in usage, "tyrants" came to be called bad and wicked kings, cultivating the ambition of the most immoderate despotism and the cruellest arbitrary government over the people.—Isidore, *Etymologies,* Book IX, chap. iii, §§ 18–20.

The very bad men come from the class of those who have power. And yet in that very class there may arise good men, and worthy of all admiration they are, for where there is great power to do wrong, to live and to die justly is a hard thing, and greatly to be praised, and few there are who attain to this.—Plato, *Gorgias,* p. 526.

To a reflecting mind it must appear very strange that the statesman should be always considering how he can dominate and tyrannize over others, whether they will or not. How can that which is not even lawful be the business of the statesman or the legislator? Unlawful it certainly is to rule without regard to justice, for there may be might where there is no right. —Aristotle, *Politics,* VII. ii. 12–13.

The difference between a lawful king and a tyrant [is] that the latter directs his government towards his individual profit and advantage, but a king to the public welfare, as Aristotle says (*Politics,* Book IV, ch. x).—*Vitoria, De iure belli,* no. 12.

There is . . . a . . . kind of tyranny, which is . . . just that arbitrary power of an individual which is responsible to no one, and governs all alike, whether equals or betters, with a view to its own advantage, not to that of its subjects, and therefore against their will. No freeman, if he can escape from it, will endure such a government.—Aristotle, *Politics,* IV. x. 4.

[15] *Per me reges regnant et tyranni per me tenent terram.* This verse reads as follows in the Clementine revision of the Vulgate: *Per me reges regnant, et legum conditores justa decernunt* (By me kings reign, and lawgivers decree just things).

There is nothing in the whole world so unjust, nothing so bloody, as a tyranny. If, however, it seems to you a desirable thing to have the cities under despotic rule begin by putting a tyrant over yourselves, and then establish despots in the other states. . . . If you knew what tyranny was as well as ourselves, you would be better advised than you now are in regard to it.—*The History of Herodotus*: "Speech of Socles the Corinthian in reply to the Spartan proposal to restore tyranny in Athens," Book V, chap. 92.

Behold, here you have a man who was ambitious to be king of the Roman People and master of the whole world; and he achieved it! The man who maintains that such an ambition is morally right is a madman; for he justifies the destruction of law and liberty and thinks their hideous and detestable suppression glorious.—Cicero, *De officiis* III. xxi. 83.

Supreme power which is either seized through sedition or held through bribery, even though it is not offensive to morals and actions, is dangerous nevertheless as an example of vice itself. And it is difficult for those things which started out badly to come to a good end.—Gratian, *Decretum,* Part II, cau. i, qu. i, can. xxv, citing Pope Leo, *Letters,* no. lxxxv, "To Mauros."

To govern the state for the sake of an increase of wealth, seems to be damnable. . . .—*Ibid.,* cau. xxiii, qu. i, can. v, citing Augustine, *On the Words of the Lord,* or Sermon LXXXII, Appendix No. 1, Maur. ed.

Whoever by promoting a man to power enslaves the laws, and subjects the city to factions, using violence and stirring up sedition contrary to law, him we will deem the greatest enemy of the whole state. But he who takes no part in such proceedings, and, being one of the chief magistrates of the state, has no knowledge of the treason, or, having knowledge of it, by reason of cowardice does not interfere on behalf of his country, such an one we must consider nearly as bad.—Plato, *Laws,* IX, p. 856.

That right [to rule] was not given to the king by Divine institution: rather was it foretold that kings would usurp that right, by framing unjust laws, and by degenerating into tyrants who preyed on their subjects. This is clear from the context that follows: *And you shall be his slaves* (Douay, *servants*): which is significative of tyranny, since a tyrant rules his subjects as though they were his slaves.—St. Thomas Aquinas, I.–II, qu. 105, art. 1, ad 5.

The power of an unjust ruler results in misfortune to the multitude, in that he converts the common good of the multitude into advantages for

himself alone.—St. Thomas Aquinas, *De regimine principum*, Book I, chap. iii.

If . . . one man governs unjustly, seeking in the government his own advantage instead of the welfare of the multitude subjected to him, such a ruler is called a tyrant.—*Ibid.*, Book I, chap. i.

Since a tyrant, holding the common good in contempt, seeks a private advantage, the consequence is that he oppresses his subjects in many ways, according to whatever falls under his various passions for the attaining of some advantage. One who, for instance, is possessed by the passion of avarice, seizes the property of his subjects. Whence Solomon said: "The king by judgment establisheth the land: but he that receiveth gifts overthroweth it." [Prov. 29:4.] If, indeed, he is mastered by the passion of anger, he sheds blood for no reason; as is said in Ezek. [22: 27]: "Her princes in the midst thereof are like wolves ravening the prey, to shed blood." . . . Under these circumstances there will be no security, but all will be uncertain, since [such a ruler] is forsaken by justice; nor can anything be stable which depends on another's will, not to say his lust. Not only does he oppress his subjects in temporal matters, but he even interferes with their spiritual welfare, since those whose aim is power rather than service hinder all progress on the part of their subjects, regarding every good quality of those whom they rule as prejudicial to their own unjust government. For to tyrants good things are even more the object of suspicion than evil things, and they are ever fearful of another's virtue. Therefore such tyrants, fearing lest their virtuous subjects, moved by a lofty purpose, may gather courage and cease to endure their unjust rule, and apprehensive that a compact of friendship may be established among those subjects and they may rejoice mutually in the advantages of peace—such tyrants seek to keep people from trusting one another, in order that the populace may not be able to take any action against their government.

On account of this they sow disagreements among the people, and nourish those which exist, and they prohibit those things which tend towards human agreement, such as marriage and feasts and other things of that kind whereby intimate friendship and good faith are wont to be generated among men. They seek also to keep their subjects from being powerful or rich because, knowing their own wickedness, they judge others accordingly, for just as their own power and riches are used to injure others, so they fear lest the power and wealth of their subjects may become a source of injury to them. —St. Thomas Aquinas, *De regimine principum*, Book I, chap. iii.

The aim of a society of free men is one thing, that of a society of slaves is another. A free man is master of himself, a slave belongs to another. If therefore a multitude of free men is governed for the common good of the multitude, such government will be right and just, as is fitting for free men. If the government, however, is not for the common good, but is ordained for private interests of the ruler, it will be an unjust and evil government.—St. Thomas Aquinas, *De regimine principum,* Book I, chap. i.

Hated sovereignty is never long retained.—Seneca, *Phoenissae,* line 660.

Seldom does it happen, therefore, that the rule of tyrants is of long duration. This becomes manifest if one considers how the tyrant's rule is maintained. For it is not founded upon love, since subjects feel little or no friendship for a tyrant; and on the other hand the tyrant is without confidence in his subjects. . . . There remains, therefore, only fear to support the government of tyrants; hence their every aim and purpose is to be feared by their subjects. Fear, however, supplies a poor foundation for government. For if an opportunity occurs in which they may hope for impunity, those who are subdued by fear rise up against their rulers, and all the more violently because they have been restrained against their will, through fear alone. . . . Therefore the power of a tyrant cannot be of long duration.—St. Thomas Aquinas, *De regimine principum,* Book I, chap. x.

The only friend worth mentioning, whom the tyrant can have, will be one who is of the same character, and has the same likes and dislikes, and is at the same time willing to be subject and subservient to him; he is the man who will have power in the state, and no one will injure him with impunity.—Plato *Gorgias,* p. 510.

Corrupt and il disposed mindes . . . discover their vices . . . whan they be filled with authoritie. For then they are not able to carie the heavie burdien of poure, but forsake them selves and scatter on every side greedie desire, pride, wrath, solemnesse and such tirannicall facions as they have within them. Wherupon without regard they persecute the good and wise, and promote the wicked. And they can not abide to have frendshippes, assemblies and conferences among Citizins in Cities. But maintein spies, promoters, murtherers and cutthrotes to put men in feare and to make them become feintharted. And they sowe debate and striefe to keepe them in division and weake. And of these maners insue infinit damages and the uttre undoinge of the poore people, and often times cruell slaughter or at the least continuall feare to the Tirannes them selves. For good Princis feare not for

them selves but for their sakes whom they rule over: and Tyrannes feare verie them whom they rule over. Therfore the more numbre of people they rule over and the mightier they are, the more is their feare and the more ennemies they have.—Castiglione, *The Courtier* (Hoby trans., pp. 315–16).

Were a prince to misuse his subjects by compelling them to go soldiering and to contribute money for his campaigns, not for the public good, but for his own private gain, this would be to make slaves of them.—Vitoria, *De iure belli*, no. 12.

It is indeed natural that men reared in fear should degenerate, becoming servile of spirit, and should be timid in the face of all courageous and vigorous actions, as experience shows to be the case in countries which have long been under a tyrant's sway.—St. Thomas Aquinas, *De regimine principum*, Book I, chap. iii.

Rebellion against Tyrannical Magistrates

We have no ties of fellowship with a tyrant, but rather the bitterest feud; and it is not opposed to nature to rob, if one can, a man whom it is morally right to kill;—nay, all that pestilent and abominable race should be exterminated from human society. And this may be done by proper measures; for as certain members are amputated, if they show signs themselves of being bloodless and virtually lifeless and thus jeopardize the health of the other parts of the body, so those fierce and savage monsters in human form should be cut off from what may be called the common body of humanity.—Cicero, *De officiis* III. vi. 32.

If the yoke of tyranny becomes intolerable, some have held that it is a courageous action on the part of a brave man to slay the tyrant and to expose himself to the danger of death for the sake of liberating the multitude. . . . It would be hazardous for the multitude, however, and for their leader if individuals, presuming to act on their own initiative, should attempt the death of rulers, even of tyrants. . . . It seems rather, on the other hand, that action against the cruelty of tyrants should be taken not by certain private individuals as such, but by public authority. . . . Indeed if any society has the right to provide itself with a king, it is not unjust that the king thus instituted can be destroyed or his power restrained by that society if he uses his power in a tyrannical fashion. Nor should it be thought that such a multitude acts faithlessly in forsaking a tyrant, even if previously it has permanently subjected itself to him, since the king himself deserves, in

Most requisite . . . it is that to devise laws which all men shall be forced to obey none but wise men be admitted. Laws are matters of principal consequence; men of common capacity and but ordinary judgment are not able (for how should they?) to discern what things are fittest for each kind and state of regiment. We cannot be ignorant how much our obedience unto laws dependeth upon this point.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. x. 7.

The laws are, and ought to be, relative to the constitution, and not the constitution to the laws. A constitution is the organization of offices in a state, and determines what is to be the governing body, and what is the end of each community. But laws are not to be confounded with the principles of the constitution: they are the rules according to which the magistrates should administer the state, and proceed against offenders.—Aristotle, *Politics,* IV. i. 9–10.

"Tell me, Pericles," he [Alcibiades] said, "can you teach me what a law is?"

"Certainly," he replied.

"Then pray teach me. For whenever I hear men praised for keeping the laws, it occurs to me that no one can really deserve that praise who does not know what a law is."

"Well, Alcibiades, there is no great difficulty about what you desire. You wish to know what a law is. Laws are all the rules approved and enacted by the majority in assembly, whereby they declare what ought and what ought not to be done."

"Do they suppose it is right to do good or evil?"

"Good, of course, young man,—not evil."

"But if, as happens under an oligarchy, not the majority, but a minority meet and enact rules of conduct, what are these?"

"Whatsoever the sovereign power in the State, after deliberation, enacts and directs to be done is known as a law."

"If, then, a despot, being the sovereign power, enacts what the citizens are to do, are his orders also a law?"

"Yes, whatever a despot as ruler enacts is also known as a law."

"But force, the negation of law, what is that, Pericles? Is it not the action of the stronger when he constrains the weaker to do whatever he chooses, not by persuasion, but by force?"

"That is my opinion."

"Then whatever a despot by enactment constrains the citizens to do without persuasion, is the negation of law?"

"I think so: and I withdraw my answer that whatever a despot enacts without persuasion is a law."

"And when the minority passes enactments, not by persuading the majority, but through using its power, are we to call that force or not?"

"Everything, I think, that men constrain others to do 'without persuasion,' whether by enactment or not, is not law, but force."

"It follows then, that whatever the assembled majority, through using its power over the owners of property, enacts without persuasion is not law, but force?"

"Alcibiades," said Pericles, "at your age, I may tell you, we, too, were very clever at this sort of thing. For the puzzles we thought about and exercised our wits on were just such as you seem to think about now."

"Ah, Pericles," cried Alcibiades, "if only I had known you intimately when you were at your cleverest in these things!"

—Xenophon, *Memorabilia* I. ii. 41–47.

As every citizen has an equal share in civil rights, so everybody should have an equal share in the laws; and therefore . . . it should not be lawful to propose a law affecting any individual, unless the same applied to all Athenians.—Demosthenes, *Against Aristocrates,* § 86.

Law is the bond which secures these our privileges in the commonwealth, the foundation of our liberty, the fountain-head of justice. Within the law are reposed the mind and heart, the judgement and the conviction of the state. The state without law would be like the human body without mind—unable to employ the parts which are to it as sinews, blood, and limbs. The magistrates who administer the law, the jurors who interpret it—all of us in short—obey the law to the end that we may be free.—Cicero, *Pro Cluentio* liii. 146.

A statute is a general precept; a resolution of men learned in the law; a restraint of crimes committed either voluntarily or through ignorance; or a general obligation of the State.—*Digest* I. iii. 1.

Now as the learned in the laws of this land observe, that our statutes sometimes are only the affirmation or ratification of that which by common law was held before; so here it is not to be omitted that generally all laws human, which are made for the ordering of politic societies, be either such

as establish some duty whereunto all men by the law of reason did before stand bound, or else such as make that a duty now which before was none. —Hooker, *Of the Laws of Ecclesiastical Polity,* I. x. 10.

When you are framing your laws, you must scrutinize their purport; but when you have passed them, you must uphold them and put them in force, for that is required by your oath and by justice as well.—Demosthenes, *Against Meidias,* § 34.

Prudence is in the highest degree necessary to lawmaking.—Suárez, *De legibus,* Book I, chap. v, § 15.

Lawmakers must have an eye to the place where, and to the men amongst whom . . . [for] one kind of laws cannot serve for all kinds of regiment.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. x. 9.

Laws politic, ordained for external order and regiment amongst men, are never framed as they should be, unless presuming the will of man to be inwardly obstinate, rebellious, and averse from all obedience unto the sacred laws of his nature; in a word, unless presuming man to be in regard of his depraved mind little better than a wild beast, they do accordingly provide notwithstanding so to frame his outward actions, that they be no hindrance unto the common good for which societies are instituted: unless they do this, they are not perfect.—*Ibid.,* 1.

Communities which have no laws of the prince or of the people resort naturally to the things that natural law teaches. Therefore it is said that the law of nature is not written law, that what natural reason teaches cannot be forgotten. But the rights and laws established by the prince or by the people are written, for which reason they can easily be forgotten, and such law is called written and special law. But natural law is called common law and law which is not written except in the hearts of men. . . .

The law which the prince and the peoples establish must first of all be righteous . . . it must be founded in the first place upon the law of nature and must be advantageous to the people in that it should be designed for the common good and for the benefit of the people. . . . It is expedient that the law conform to the customs of the country and should be in harmony with the usages and conditions of the people.—Egidio Colonna, *Li Livres du gouvernement des rois,* Book III, part II, chaps. xxii, xxiv.

We can prove that the laws must be righteous, and that all laws are founded on right reason, because if laws are not righteous they are not laws

but corruptions . . . no regulation of the prince or the people can be righteous if it does not proceed in some manner from the natural law and if natural reason does not teach that it should be established . . . all righteous laws must look to the welfare and common advantage of the people, and if there is any law which does not aim chiefly at the common good, it is not the law of a king but of a tyrant.—*Ibid.*, chap. xxiv.

Whoever contemplates the good of the state contemplates the end of Right, as may be explained thus. Right is a real and personal relation of man to man, which maintained preserves society, and infringed upon destroys it. That account in the *Digests* does not teach what the essence of Right is; it simply describes Right in terms of practice. If our definition truly comprehends what Right is and wherefore, and if the end of all society is the common good of the individuals associated, then the end of all Right must be the common good, and no Right is possible which does not contemplate the common good. Tully justly notes in the first book of the *Rhetoric* [*De invent.* I. xxxviii. 68] that "The laws should always be interpreted for the good of the state." For if the laws are not directed for the benefit of those under the laws, they are laws merely in name, they cannot be laws in reality. Law ought to bind men together for general advantage. Wherefore Seneca[17] says truly in his book on the Four Virtues, "Law is the bond of human society." So it is clear that whoever contemplates the good of the state contemplates the end of Right.—Dante, *De monarchia* II. vi. 1.

The intention of a lawgiver in making a law ought to be directed towards the common good, since the common happiness should be a measure, and as it were, a first principle, by means of which the justice, utility and fitness of a law are measured.—Suárez, *De legibus,* Book I, chap. vi, § 4.

There is a bond of fellowship . . . which has the very widest application, uniting all men together and each to each. This bond of union is closer between those who belong to the same nation, and more intimate still between those who are citizens of the same city-state. It is for this reason that our forefathers chose to understand one thing by the universal law and another by the civil law. The civil law is not necessarily also the universal law; but the universal law ought to be also the civil law.—Cicero, *De officiis* III. xvii. 69.

[17] As stated by Miss Aurelia Henry (Dr. Aurelia Henry Reinhardt), from whose translation of the *De monarchia* this quotation is taken, the work *De quatuor virtutibus,* which Dante credits to Seneca, was written by one Martin, Abbot of Dumiens and Bishop of Braga, in the latter part of the sixth century.

Christians, by the mere fact that they are Christians, do not cease to be men and citizens, and hence members of a temporal State, therefore they should have for their human acts some rule by which they may be guided in their business relations and customary intercourse with other men; moreover, the natural law is not sufficient, for it gives only general principles, and does not come down to particular cases; even the law of the Church is not sufficient, since it is concerned only with Divine and heavenly things, as is known, while the Divine political law of the Old Testament has now been abrogated, since it was suitable only for that one people, the Jews, and for their condition; therefore some other human rule is necessary, the will, surely, of the ruler, or some law drawn up by the authority of the ruler. And although the will of the ruler suffices to some degree when the ruler is wise and the nation is small, yet it is absolutely necessary that the nation, if it is to be ruled rightly, must be ruled by laws, not merely by the will of the ruler.—Bellarmine, *De laicis* x (Murphy trans., p. 42).

Even if the decision of a ruler be most upright, it is scarcely ever free from suspicion, envy, complaints, and abusive words; but decision by law is free from all these, because, indeed, it is known that the law cannot be corrupted by bribes.—*Ibid.* (p. 43).

I should wish the citizens to be as readily persuaded to virtue as possible; this will surely be the aim of the legislator in all his laws.—Plato, *Laws,* IV, p. 718.

There is no great inclination or readiness on the part of mankind to be made as good, or as quickly good, as possible.—*Ibid.*

The intention . . . of a reasonable statesman, is not what the many declare to be the object of a good legislator, namely, that the state for the true interests of which he is advising should be as great and as rich as possible, and should possess gold and silver, and have the greatest empire by sea and land;—this they imagine to be the real object of legislation, at the same time adding, inconsistently, that the true legislator desires to have the city the best and happiest possible. But they do not see that some of these things are possible, and some of them are impossible; and he who orders the state will desire what is possible, and will not indulge in vain wishes or attempts to accomplish that which is impossible. The citizen must indeed be happy and good, and the legislator will seek to make him so; but very rich and very good at the same time he cannot be.—*Ibid.,* V, p. 742.

The civil [law], which Augustine is accustomed to call the temporal . . . is that law which is devoted to the political government of the state, the guarding of temporal rights, and the preservation of the commonwealth in peace and justice.—Suárez, *De legibus,* Book I, chap. iii, § 20.

It would be contrary to every consideration of rectitude that the common good should be subordinated to the private good, or the whole accommodated to a part for the sake of the latter; and therefore, since law is made for a community, it should of its very nature be directed primarily to the good of the community.—*Ibid.,* chap. vii, § 4.

As Augustine says (*De civ. Dei* II. xxi), quoting Tully, "a nation is a body of men united together by consent to the law and by community of welfare." Consequently it is of the essence of a nation that the mutual relations of the citizens be ordered by just laws. Now the relations of one man with another are twofold: some are effected under the guidance of those in authority: others are effected by the will of private individuals. . . . The decision of matters between one man and another, and the punishment of evildoers, depend on the direction of those in authority, to whom men are subject. On the other hand, the power of private persons is exercised over the things they possess: and consequently their dealings with one another, as regards such things, depend on their own will, for instance in buying, selling, giving, and so forth.—St. Thomas Aquinas, I.–II, qu. 105, art. 2.

It is . . . necessary that each person should take counsel not only for himself, but also for others, preserving peace and justice, a condition that could not be brought about in the absence of appropriate laws. Again, it is necessary that those points which relate to the common good of men, or of the state, should be accorded particular care and observance; yet, men as individuals have difficulty in ascertaining what is expedient for the common good, and moreover, rarely strive for that good as a primary object; so that, in consequence, there was a necessity for human laws that would have regard for the common good by pointing out what should be done for its sake and by compelling the performance of such acts.—Suárez, *De legibus,* Book I, chap. iii, § 19.

A really wholesome law, such as is calculated to benefit the people, ought, in the first place, to be drawn simply and intelligibly, not in such terms that one man thinks it means this and another that; and, secondly, . . . the proceedings prescribed by the law ought to be practicable, for if a law,

though well-meant, were to enjoin what is impossible, it would be attempting the work not of a law, but of a prayer. Furthermore, it should plainly appear that it does not offer an easy time to any wrongdoer.—Demosthenes, *Against Timocrates,* §§ 68–69.

It is proper that laws, properly enacted, should themselves define the issue of all cases as far as possible, and leave as little as possible to the discretion of the judges; in the first place, because it is easier to find one or a few men of good sense, capable of framing laws and pronouncing judgements, than a large number; secondly, legislation is the result of long consideration, whereas judgements are delivered on the spur of the moment, so that it is difficult for the judges properly to decide questions of justice or expediency. But what is most important of all is that the judgement of the legislator does not apply to a particular case, but is universal and applies to the future, whereas the member of the public assembly and the dicast have to decide present and definite issues, and in their case love, hate, or personal interest is often involved, so that they are no longer capable of discerning the truth adequately, their judgement being obscured by their own pleasure or pain.

All other cases . . . should be left to the authority of the judge as seldom as possible, except where it is a question of a thing having happened or not, of its going to happen or not, of being or not being so; this must be left to the discretion of the judges, for it is impossible for the legislator to foresee such questions.—Aristotle, *The "Art" of Rhetoric,* I. i. 7–8.

Everybody, whether in public life or outside it, constantly attributes all the prosperity of Athens to her laws. . . . It is true that the city is preserved by laws.—Demosthenes, *Against Timocrates,* §§ 155–56.

If a man introduces a law by which unlimited license and immunity is granted to those who seek to defraud their fellow-citizens, he is guilty in respect of the whole city, and he brings disgrace upon everybody; for an infamous statute, when ratified, is a discredit to the government that enacted it and an injury to everyone who lives under it.—*Ibid.,* § 205.

A law, . . . which ceases to be useful to the State, is no longer a law.—Vitoria, *De potestate civili,* no. 22.

The Power to Make Laws

Even as all paternity comes from God, so, too, does [the power of] every legislator, and . . . the authority of all laws must ultimately be ascribed to Him. For truly, if a law be divine, it flows directly from Him; if, on the

other hand, it be human, that law is surely ordained by man, acting as God's minister and vicar.—Suárez, *De legibus,* Preface.

Laws do not take their constraining force from the quality of such as devise them, but from that power which doth give them the strength of laws . . . by the natural law . . . the lawful power of making laws to command whole politic societies of men belongeth so properly unto the same entire societies, that for any prince or potentate of what kind soever upon earth to exercise the same of himself, and not either by express commission immediately and personally received from God, or else by authority derived at the first from their consent upon whose persons they impose laws, it is no better than mere tyranny.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. x. 8.

Let us return to our specified purpose, namely, the demonstration of the truth that human authority to establish laws pertains solely to the whole body of citizens or the preponderant part thereof. . . . For, in an absolute sense, primary authority among men to establish or institute human laws pertains only to that source from which none but the best laws can proceed; and this source consists in the whole body of citizens, or in the preponderant part thereof, acting as the representative of the whole body.—Marsiglio of Padua, *Defensor pacis, Dictio* I, chap. xii, sec. 5.

We may say truthfully, and in accordance with the conclusion reached by Aristotle (*Politics* III. vi [or, *Pol.* III. xi]), that the "legislator" (or in other words, the efficient cause of law, in the primary and strict sense) is the people, that is to say, the whole body of citizens, or else the preponderant part thereof, commanding or determining (either through elected representatives, or by an express declaration of will in the general assembly of the citizens), with regard to the actions of human beings in their civic capacity, that a given thing shall be done or left undone, subject to penalty, or rather, to temporal punishment. In using the expression "preponderant part," I take into consideration both the quantity and the quality of the persons involved, with respect to the community for which a given law is decreed.—*Ibid.,* sec. 3.

But I shall offer proof of a second proposition (namely, that the best law proceeds only from the discussions and commands of the collective multitude) by assuming with Aristotle (*Politics* III. vii [or, *Pol.* III. xiii]) that those laws are best which have been enacted for the common advantage of the citizens. Wherefore he has said: "Right, moreover" (that is to say, in

the case of laws), "is to be considered (as it were) with reference to state welfare and the common interest of the citizens."—Marsiglio of Padua, *Defensor pacis, Dictio* I, chap. xii, sec. 5.

Either the authority to legislate pertains solely to the whole body of citizens, as we have maintained, or else it pertains to a single individual or to a comparatively small number of individuals. [But] it does not pertain exclusively to one individual, for the reasons already set forth . . .; since such a legislator might enact a bad law, owing to ignorance or malice or both causes—acting, that is to say, with a greater regard for his own personal advantage than for the common advantage—with the result that the law would be tyrannical. Moreover, and for a similar reason, legislative authority does not pertain to a comparatively small number of persons; since they, like that single individual, might commit the fault of enacting a law directed to the advantage of certain (that is, a few) persons rather than to the common advantage; a fault which is seen to occur in oligarchies. Therefore, the aforesaid authority pertains to the whole body of citizens or to the preponderant part thereof; for a different and reverse argument will apply to this [source of legislation].—*Ibid.*, sec. 8.

This [law-making] may be done by the aforesaid whole body of citizens or preponderant part thereof, acting directly and of itself; or, those citizens may have entrusted the performance of the task to a certain individual or group of individuals who are not, and cannot be, the legislator in an absolute sense, but who discharge the legislative function solely for a definite purpose and during a definite period, in accordance with the authority of the primary legislator. . . . And furthermore, I maintain that in the case of laws, and such other provisions as are established by the electoral process, this same authority should be the source of additions, eliminations or total alterations, as well as of interpretation and suspension, in accordance with the exigencies of time, place, or other circumstance which may render some action of the kind, in regard to such laws and provisions, advantageous to the common welfare. Moreover, laws should be promulgated or proclaimed by this authority after they have been enacted, lest any citizen or alien who transgresses them should be able to offer his ignorance of the said laws, as an excuse.—*Ibid.*, sec. 3.

It is difficult, if not impossible, for all persons to agree upon one opinion, since certain persons are by nature blind, and at variance (through malice or singular ignorance) with the general judgment; yet provisions for the

common welfare ought not to be impeded nor neglected because of the irrational disapprobation and objections of these individuals. Therefore, authority to establish or institute laws pertains solely to the whole body of citizens or to the preponderant part thereof.—*Ibid.*, sec. 5.

For a greater number is better able than any part of that number, to perceive defects in connection with a law proposed for enactment; since the *whole* of a body, *in its entirety,* is in any case *superior,* both in might and in merit, to every separate *part of itself.* Furthermore, it is to be expected that a commonly applicable law will be more beneficial when it emanates from the multitude as a whole, since no one deliberately injures himself.—*Ibid.*

Legislative authority pertains solely to that agent by whom laws are better enacted, or through whom they gain unqualified observance. But only the whole body of citizens constitutes such an agent. Therefore, legislative authority pertains to that body.—*Ibid.*, sec. 6.

The public power of all societies is above every soul contained in the same societies. And the principal use of that power is to give laws unto all that are under it; which laws in such case we must obey, unless there be reason shewed which may necessarily enforce that the law of reason or of God doth enjoin the contrary. Because except our own private and but probable resolutions be by the law of public determinations overruled, we take away all possibility of sociable life in the world.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. xvi. 5.

A twofold capacity may be considered to reside in a community, one to make law, another to receive law.—Suárez, *De legibus,* Book VII, chap. ix, § 10.

The capacity . . . for making laws resides in all perfect communities, that is, cities or peoples, which have the power to be bound by their own laws, whether common or municipal, even though they have a prince over them, since, with his consent at least, they can make laws.—*Ibid.*, chap. iii, § 10.

The power [of legislation] is so given by nature and by the Author of nature, as to be capable of undergoing such change as may be expedient for the common good.—*Ibid.*, Book III, chap. iii, § 8.

Since this power [of making laws] is a part of the nature of things, and since—whether it be physical or moral—it is in an absolute sense a good thing, extremely valuable and necessary for the good estate of human nature, it therefore must flow from the Author of that nature.—*Ibid.*, § 4.

This power does exist in men, and it does not exist in each individual, nor in any specific individual, as has also been shown; therefore, it exists in mankind viewed collectively.—Suárez, *De legibus,* Book III, chap. ii, § 4.

This power [of human legislation] does not manifest itself in human nature until men gather together into one perfect community and are politically united. My assertion is proved as follows: the said power resides not in individual men separately considered, nor in the mass or multitude of them collected, as it were, confusedly, in a disorderly manner, and without union of the members into one body; therefore, such a political body must be constituted, before power of this sort is to be found in men, since—in the order of nature, at least—the agent of the power must exist prior to the existence of the power itself. Once this body has been constituted, however, the power in question exists in it, without delay and by the force of natural reason; and consequently, it is correctly supposed that it exists as a characteristic property resulting from such a mystical body, already constituted with just the mode of being [that it has] and not otherwise. Wherefore, even as man—by virtue of the very fact that he is created and has the use of reason—possesses power over himself and over his faculties and members for their use, and is for that reason naturally free (that is to say, he is not the slave but the master of his own actions); just so the political body of mankind, by virtue of the very fact that it is created in its own fashion, possesses power over itself and the faculty of self-government, in consequence whereof it also possesses power and a peculiar dominion over its own members. Moreover, by a similar process of reasoning, just as freedom [of will] has been given to every man by the Author of nature, yet not without the intervention of a proximate cause—that is to say, the parent by whom [each man] is procreated—even so the power of which we are treating, is given to the community of mankind by the Author of nature, but not without the intervention of will and consent on the part of the human beings who have assembled into this perfect community.—*Ibid.,* chap. iii, § 6.

Although this power is (so to speak) a natural attribute of a perfect human community, viewed as such, nevertheless, it does not reside immutably therein, but may be taken from that community—by its own consent or through some other just means—and transferred to another [seat of authority].—*Ibid.,* § 7.

In those commonwealths which are free in fact and which retain in themselves the supreme power, though they commit the task of legislation to a

senate, or to a leader, [and in the latter case,] either to the leader alone or to him in association with the senate . . . such legislators are perhaps simple delegates; and they will consequently be unable to delegate [in turn,] their own power, unless this very ability is expressly provided for in the delegation [of power to themselves], or unless it is rendered clear by the light of custom that the power in question has been committed to them with that provision, a supposition which relates to fact rather than to law.—*Ibid.*, chap. iv, § 12.

The degree and mode of sovereignty will be in accordance with the degree and mode of jurisdiction.—*Ibid.*, chap. i, § 10.

The legislative power, being—as it is—a power of sovereign command, is accordingly one of jurisdiction.—*Ibid.*

In the case of divine law, the Will of the Legislator—since His Will has the force of reason—suffices to render the law just and binding; whereas the Will of the Legislator does not suffice to render human law just and binding, for the precepts of the latter must also be advantageous to the State and in harmony with the other laws.—Vitoria, *De potestate civili,* no. 16.

It is not inherent in the nature of law that it should necessarily be made for the entire community taken as a whole, so to speak. For there may reside in a portion of that [whole], a community that is [in itself] sufficient, and a basis that is sufficient, for the perpetuity of a law and for the derivation of the latter from a political jurisdiction pertaining directly to the common government.—Suárez, *De legibus,* Book I, chap. vi, § 24.

Approval of Legislation by the People

What, then, is the only honest and trustworthy safeguard of the laws? You, the common people. It is beyond the power of mortal man to take away from you the right to determine and to approve the best policy.—Demosthenes, *Against Timocrates,* § 37.

A statute is what the people order and establish.—*Institutes of Gaius,* I. i. 3.

The laws themselves derive their force from the fact that they have been accepted by the judgment of the people; the same, therefore, must be said of those unwritten laws of which the people have approved.—Suárez, *De legibus,* Book VII, chap. ix, § 6.

Laws they are not . . . which public approbation hath not made so. But approbation not only they give who personally declare their assent by voice, sign, or act, but also when others do it in their names by right originally at the least derived from them. As in parliaments, councils, and the like assemblies, although we be not personally ourselves present, notwithstanding our assent is, by reason of others, agents there in our behalf. And what we do by others, no reason but that it should stand as our deed, no less effectually to bind us than if ourselves had done it in person.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. x. 8.

THE LAW OF NATIONS

The whole of this controversy and discussion was started on account of the aborigines of the New World, commonly called Indians, who came forty years ago into the power of the Spaniards, not having been previously known to our world. This present disputation about them will fall into three parts. In the first part we shall inquire by what right these Indian natives came under Spanish sway. In the second part, what rights the Spanish sovereigns obtained over them in temporal and civil matters. In the third part, what rights these sovereigns or the Church obtained over them in matters spiritual and touching religion, in the course of which an answer will be given to the question before us.—Vitoria, *De Indis*, Sec. I, Introduction.

THE LAW OF NATIONS

Ancient Ius Gentium and the Law of Nations

All peoples who are ruled by laws and customs partly make use of their own laws, and partly have recourse to those which are common to all men; for what every people establishes as law for itself is peculiar to itself, and is called the Civil Law, as being that peculiar to the State; and what natural reason establishes among all men and is observed by all peoples alike, is called the Law of Nations, as being the law which all nations employ.[1]—*Institutes of Gaius,* I. i. 1.

The Law of Nations, however, is common to the entire human race, for all nations have established for themselves certain regulations exacted by custom and human necessity. For wars have arisen, and captivity and slavery, which are contrary to natural law, have followed as a result, as, according to Natural Law, all men were originally born free; and from this law nearly all contracts, such as purchase, sale, hire, partnership, deposit, loan, and innumerable others have been derived.—*Institutes of Justinian,* I. ii. § 2.

The law of nations comprises the seizing, building and fortifying of settlements; wars, captivities, servitudes, postliminies, treaties of peace, truces, the obligation to respect the inviolability of ambassadors, and the prohibition of intermarriage with foreigners. This is called the law of nations because nearly all nations observe it.—Isidore, *Etymologies,* Book V, chap. vi.

The existence of the *ius gentium* . . . is assumed by all authorities to be an established fact, or so we gather from their very frequent use of the term. For the *ius gentium* is often mentioned in the civil law (*Digest* I. i. 1, § 2 and *Institutes* I. ii), and in the *Decretum* (Part I, dist. i *et seq.*), which is based on Isidore (*Etymologies,* Book V, chap. vi); by the Doctors of both canon and civil law, in their comments on the passages above-mentioned and *passim;* and by St. Thomas (II.–II, qu. 57, art. 3) and the theologians. —Suárez, *De legibus,* Book II, chap. xvii, § 1.

[1] This passage is repeated almost word for word in Justinian's *Digest* (I. i. 9) and in his *Institutes* (I. ii, § 1).

A particular matter (as I infer from Isidore and other jurists and authorities) can be subject to the *ius gentium* in either one of two ways: first, on the ground that this is the law which all the various peoples and nations ought to observe in their relations with each other; secondly, on the ground that it is a body of laws which individual states or kingdoms observe within their own borders, but which is called *ius gentium* because the said laws are similar [in each instance] and are commonly accepted.

The first interpretation seems . . . to correspond most properly to the actual *ius gentium* (law of nations) as distinct from the civil law. . . . Similarly, in my judgment, the law of war—in so far as that law rests upon the power possessed by a given state or a supreme monarchy, for the punishment, avenging, or reparation of any injury inflicted upon it by another state—would seem to pertain properly to the law of nations.—Suárez, *De legibus,* Book II, chap. xix, § 8.

As to the *ius gentium* when interpreted in the second sense, it is easy to explain the source of the great similarity of forms in which that law exists among the various nations; although, in other respects and essentially, this phase of the *ius gentium* is [simply] civil law. The explanation regarding that similarity is, partly, that the resemblance is not always perfect, but lies only in a certain general and common character, as I have explained above; partly, that such a common character, although it is not in an absolute sense derived from natural law, is nevertheless so closely related to, and so thoroughly in accord or harmony with nature, that through it the individual nations could easily have been led to adopt the rules in question; and partly, that tradition and a mutual imitation, dating from the beginning of the human race and growing with the growth and dissemination of that race, may have added their influence in this matter.—*Ibid.,* chap. xx, § 1.

The second kind of *ius gentium* embodies certain precepts, usages, or modes of living, which do not, in themselves and directly, relate to all mankind; neither do they have for their immediate end (so to speak) the harmonious fellowship and intercourse of all nations with respect to one another. On the contrary, these usages are established in each state by a process of government that is suited to the respective courts of each. Nevertheless, they are of such a nature that, in the possession of similar usages or laws, almost all nations agree with one another; or at least they resemble one another, at times in a generic manner, and at times specifically, so to speak. —*Ibid.,* chap. xix, § 10.

For the *ius gentium* in the former [i.e., civil law] phase may be changed by an individual kingdom or state to an extent affecting that state alone; since the law in question, as it exists within the said state, is intrinsically (so to speak) nothing more or less than civil law, and is called *ius gentium* only because of its kinship and harmony [with the laws] of other states, or because it is so closely related to the natural law that it is in consequence applied universally to all or almost all nations. Considered in itself, however, as it exists in each separate state, this form of law is dependent upon the particular determination [of general law], the power and the custom of that state in itself, without respect to any other. Therefore, such law may be changed in any one country by that country even though the others do not consent; for individual nations are not bound to conform to others.—*Ibid.*, chap. xx, § 7.

Law of Nations and Natural Law

The *ius gentium* is [of all systems] the most closely related to the natural law.—*Ibid.*, Book II, Introduction.

The law of nations (*jus gentium*), . . . either is natural law or is derived from natural law (*Inst.*, I. ii. 1): "What natural reason has established among all nations is called the *jus gentium*."— Vitoria, *De Indis*, Sec. III, no. 2.

The Law of Nations is that used by the human race, and it is easy to understand that it differs from natural law, for the reason that the latter is common to all animals, while the former only concerns men in their relations to one another.—*Digest* I. i. 1, § 4, quoting Ulpian's *Institutes*.

The law of nations is indeed, in some way, natural to man, in so far as he is a reasonable being, because it is derived from the natural law by way of a conclusion that is not very remote from its premisses. Wherefore men easily agreed thereto. Nevertheless it is distinct from the natural law, especially from that natural law which is common to all animals.—St. Thomas Aquinas, I.–II, qu. 95, art. 4, ad 1.

The *ius gentium* . . . has a close affinity with the natural law, so that many persons confuse it therewith, or hold that the *ius gentium* is a part of the natural law. . . . Even in those aspects wherein the two are distinguished, the kinship is very close and the *ius gentium* constitutes an intermediate form (so to speak) between the natural and the human law, a form

more closely allied to the first of these extremes.—Suárez, *De legibus*, Book II, chap. xvii, § 1.

The *ius gentium* and natural law agree, first, in that both are in a sense common to all mankind. . . . Secondly, these two kinds of law agree in the fact that, just as the subject matter of the *ius gentium* has application to men alone, so also the subject matter of the natural law is peculiar to mankind, either in its entirety, or in great part. . . . Thirdly, the *ius gentium* and the natural law agree in that both systems include precepts, prohibitions, and also concessions or permissions.—*Ibid.*, chap. xix, § 1.

The law of nations is a sort of conclusion drawn from the natural law by human reason.—Bellarmine, *De laicis* vi (Murphy trans., p. 27).

The *ius gentium* is a form of law, intermediate (as it were) between the natural and the civil law. For, in a certain sense, the *ius gentium* is in harmony with the natural law, because of the common acceptance and universal character of the former, and the ease with which its rules may be inferred from natural principles; although this process of inference is not one of absolute necessity and manifest evidence, in which latter respect the law in question agrees with human law. Accordingly, certain natural precepts, which have been established simply by deduction and the formulation of which requires that process, have occasionally been called precepts of the *ius gentium;* and, in like manner, examples of the *ius gentium* are sometimes confused with examples of the natural law.—Suárez, *De legibus,* Book II, chap. xx, § 10.

Since natural reason dictates matters which are according to the right of nations [*ius gentium*], as implying a proximate equality, it follows that they need no special institution, for they are instituted by natural reason itself. —St. Thomas Aquinas, II.–II, qu. 57, art. 3, ad 3.

Law may sometimes be called human, not with respect to its author but with respect to its subject-matter and because it is concerned with human affairs; and in this sense the natural law itself is human, since it governs the human race and directs the actions of mankind. It is thus that Aristotle (*Nicomachean Ethics,* Book V, chap. vii) seems to have understood the term "human law," which he himself, in the terminology of his translator, calls *ius politicum* (political law), or *civile* (civil). Accordingly, he divides civil law into natural and conventional, referring by the latter term to what we call positive civil law. St. Thomas (I.–II, qu. 95, art. 2) also seems to have

interpreted human law in this sense, for he divides it into that which derives its force from natural reasoning and that which derives it from the free will of men; two divisions which seem to be equivalent simply to natural and positive law. Moreover, St. Thomas (*Ibid.*, art. 4) calls positive law human, and he holds every law established by men to be of this character. He also makes a subdivision of laws; for there is in his classification one branch in the form of [general] conclusions, which derives its force from the natural law, and which we speak of as declaring rather than making law; whereas the other branch exists in the form of specifications which introduce a new law, and this form we call positive law, in an absolute sense. Therefore, St. Thomas, in the passage cited above, is apparently speaking of the *ius gentium* as human and positive law in the first of these two senses. For he clearly says that the *ius gentium* exists in the form of a [general] conclusion and derives its force from the natural law. He appears, moreover, to maintain this same opinion in another passage (II.–II, qu. 57, art. 3, *in corpore*). Nevertheless, the term in question may be understood properly as referring to positive and human law, that is, to law constituted by men; but that law is said to be constituted in the form of a [general] conclusion, and not a specification, since [St. Thomas] does not interpret the force of the *ius gentium* as leading to complete and concrete specification; on the contrary, he holds that the *ius gentium* is established with general force in the form of a conclusion not absolutely necessary, but so in harmony with nature that it is inferred (as it were) at the instigation of nature.—Suárez, *De legibus,* Book II, chap. xix, § 3.

The natural law would be preserved with great difficulty, if there were no *jus gentium*.—Vitoria, *De jure gentium et naturali*.[2]

The *jus gentium* so closely approaches to the natural law that the natural law cannot be preserved without this *jus gentium*.—*Ibid*.[3]

II.–II, qu. 57, art. 3: Whether the law of nations may be distinguished from the natural law. St. Thomas marks a distinction, to wit: That right is a natural right, which, from its very nature, as it were, balances the right of another. And this can happen in two ways: In one way, in that natural law of itself declares that there is a certain equality and justice—as it were to return a deposit—or, because no wrong is done to you, you do no wrong to another. In the other way [i. e. according to the *jus gentium*], some thing

[2] Trans. in J. B. Scott, *The Spanish Origin of International Law,* Part I, Appendix E, p. cxiii.

[3] *Ibid.*

is made equal to another in relation to a third thing, just as property may be private—one may not say in equity or justice—but such a division of property is ordered for the peace and concord of men which cannot be preserved unless every one should have his property clearly defined. And therefore it is the *jus gentium* that property should be private. Therefore, having posited this, the first proposition is: That which is, in the first way, equal and absolutely just, is called natural law; that is, it is of natural right. The second proposition: That which is equal and just in the second way, as it were a certain disposition of things with relation to a third just thing, is *jus gentium*. And so that which is not in itself just, but is derived from human statute firmly established in reason, is called *jus gentium*, so that on its own account it does not imply equity, but on account of something else, as in the matter of war, and other things. Whence it appears that the *jus gentium* may be distinguished from the *jus naturale*.—Vitoria, *De jure gentium et naturali*.[4]

We say with St. Thomas that the natural law is an absolute good, and not a relative good; but the *jus gentium* is only relatively good, therefore it is said that the *jus gentium* has not equity of itself, from its own nature, but was established as inviolable, from agreement among men.—*Ibid*.[5]

The *jus gentium* does not necessarily follow from the natural law, nor is it necessary simply for the conservation of the natural law, for if it should follow necessarily from the natural law, now it would be the natural law.[6] —*Ibid*.[7]

The *ius gentium*, properly so-called, is not contained within the bounds of natural law, but, . . . on the contrary it differs essentially therefrom; for although it agrees with natural law in many respects, nevertheless, the two are distinct from each other owing to practical differences in their respective characters.—Suárez, *De legibus*, Book II, chap. xix, § 1.

The *ius gentium* does not prescribe anything as being of itself necessary for righteous conduct, nor does it forbid anything as being of itself and intrinsically evil, whether [such commands and prohibitions] are absolute or whether they involve an assumption of the existence of a particular state and set of circumstances; on the contrary, all such matters pertain to the

[4] Trans. in J. B. Scott, *op. cit.*, Part I, Append. E, p. cxi.

[5] *Ibid.*, p. cxii.

[6] In his lectures on St. Thomas Aquinas (Beltrán de Heredia, *op. cit.*, tomo 2, p. 177), Vitoria adds that "the *jus gentium* cannot have derogated from natural law, although it may create [precepts] which are not a part of natural law."

[7] *Ibid.*, p. cxiii.

natural law. . . . It is from this standpoint that the *ius gentium* is outside the realm of natural law; neither does it differ from the latter in that the *ius gentium* is peculiar to mankind, for that characteristic pertains also to natural law, either in large part, or even entirely, if one is speaking of right (*ius*) and law (*lex*) in the strict sense.—*Ibid.*, chap. xvii, § 9.

The *ius gentium* differs from the natural law, primarily and chiefly, because it does not, in so far as it contains affirmative precepts, derive the necessity for these precepts solely from the nature of the case, by means of a manifest inference drawn from natural principles; for everything of this character is [strictly] natural. . . . Similarly, the negative precepts of the *ius gentium* forbid nothing on the ground that the thing forbidden is evil in itself; for such prohibitions are [properly within the province of] the natural law. From the standpoint of human reason, then, the *ius gentium* is not so much indicative of what is [inherently] evil, as it is constitutive of evil. Thus it does not forbid evil acts on the ground that they are evil, but renders [certain] acts evil by prohibiting them. . . . The two systems under discussion differ in that the *ius gentium* cannot be immutable to the same degree as the natural law. For immutability springs from necessity; and therefore, that which is not equally necessary cannot be equally immutable.—*Ibid.*, chap. xix, § 2.

The latter system [*ius gentium*], then, differs from the natural law because it is based upon custom rather than upon nature; and it is to be distinguished likewise from civil law, in its origin, basis, and universal application.—*Ibid.*, § 6.

All the precepts written by God in the hearts of men pertain to the natural law, as is indicated by the words of Paul (Rom. 2:[14–15]); and all precepts which may clearly be inferred by reason from natural principles are written in [human] hearts; therefore all such precepts pertain to the natural law.

On the other hand, the precepts of the *ius gentium* were introduced by the free will and consent of mankind, whether we refer to the whole human community or to the major portion thereof; consequently, they cannot be said to be written in the hearts of men by the Author of Nature; and therefore they are a part of the human, and not of the natural law.—*Ibid.*, chap. xvii, § 8.

Ius gentium ought to be placed more under positive law than under natural law.—Vitoria, *De jure gentium et naturali*.[8]

[8] Trans. in J. B. Scott, *The Spanish Origin of International Law*, Part I, Appendix E, p. cxii.

It suffices that law should be divided into natural and positive, properly so called, or into divine and human law, each of these being named according to its author, since the two branches are mutually exclusive, as is evident; but it has been shown that the laws of the *ius gentium* are not natural law, properly and strictly speaking, and consequently not divine; and therefore, they must be positive and human.—Suárez, *De legibus,* Book II, chap. xix, § 4.

The *ius gentium* . . . came into existence not through [natural] evidence but through probable inferences and the common judgment of mankind. Therefore, [the *ius gentium* is positive human law].—*Ibid.,* § 4.

In its universality and its general acceptance by all peoples, the natural law is common to all, and only through error can it fail of observance in any place; whereas the *ius gentium* is not observed always, and by all nations, but [only] as a general rule, and by almost all, as Isidore states. Hence, that which is held among some peoples to be *ius gentium,* may elsewhere and without fault fail to be observed.—*Ibid.,* § 2.

[Concerning] the occupation of places for settlement; building; fortification, and defence through just warfare . . . the law applying to all of these acts is the natural law, that is to say, they are all permitted by the natural law; and, in like manner, the obligation incumbent upon one person to refrain from violating such rights when they are possessed by another person pertains to a natural precept. It is only the actual exercise of these rights which may be said to fall within the field of the *ius gentium* by reason of the custom of all nations. And this exercise of rights is a matter pertaining to fact, and not to law.—*Ibid.,* chap. xviii, § 7.

With regard . . . to peace, truces, and ambassadors . . . all the rules on these points have their foundation in some human agreement, in which both the power to contract a treaty or convention, and the obligation arising from that treaty or convention and demanding good faith and justice, have regard to the law of nature. Only the exercise of these powers may be termed a part of the *ius gentium,* owing to the accord of all nations with respect to the principle of the exercise of such faculties in general. And this actual use of the powers in question is the effect of law, and not law itself; for the law under discussion does not spring from such use; on the contrary, the use has its source in the law.—*Ibid.*

In the case of any contract or commercial agreement . . . three separate factors may be distinguished. . . . The first is the specific method of making

the contract, a matter which ordinarily pertains to civil law, and which is frequently decided in accordance with the will of the contracting parties, if their will conflicts with no existing legal rule. The second factor is the observance of the contract after it has been made; and this matter, as is evident, pertains to the natural law. The third factor is the freedom to contract commercial agreements with persons not actively hostile or unfriendly in sentiment. This freedom is derived from the *ius gentium;* for it is not an obligation imposed by natural law considered in itself, inasmuch as a state might conceivably exist in isolation and refuse to enter into commercial relations with another state even if there were no unfriendly feeling involved; but it has been established by the *ius gentium* that commercial intercourse shall be free, and it would be a violation of that system of law if such intercourse were prohibited without reasonable cause.—*Ibid.*, chap. xix, § 7.

Nature and Scope of the Law of Nations

Now besides that law which simply concerneth men as men, and that which belongeth unto them as they are men linked with others in some form of politic society, there is a third kind of law which toucheth all such several bodies politic, so far forth as one of them hath public commerce with another. And this third is the *law of nations.*—Hooker, *Of the Laws of Ecclesiastical Polity,* I. x. 12.

The precepts of the *ius gentium* differ from those of the civil law in that they are not established in written form; they are established through the customs not of one or two states or provinces, but of all or nearly all nations. —Suárez, *De legibus,* Book II, chap. xix, § 6.

International law is based on natural principles which have been implanted in all by nature, and which are so well known that they need neither argument nor art to establish them.—Gentili, *De legationibus,* Book II, chap. xviii.

If we are speaking of the *ius gentium* properly so called, . . . it is easily apparent that this system of law, simply as the result of usage and tradition, could have been gradually introduced throughout the whole world, through a successive process, by means of propagation and mutual imitation among the nations, and without any special and simultaneous compact or consent on the part of all peoples. For the body of law in question has such a close relationship to nature and so befits all nations, individually and collectively, that it has grown, almost by a natural process, with the growth of the

human race; and therefore it does not exist in written form, since it was not dictated by a legislator, but has on the contrary waxed strong through usage.—Suárez, *De legibus,* Book II, chap. xx, § 1.

In the *ius gentium,* . . . the precepts are of a . . . general character, for they take into consideration the welfare of all nature, as well as conformity to her primary and universal principles. Consequently such precepts are said to be conclusions drawn from natural principles, since their appropriate character and moral value are immediately made manifest by the force of natural reflection; an appropriateness and value which have induced men to introduce the customs in question, more because of the pressure of necessity—as the Emperor Justinian has said—than because of [deliberate] will.—*Ibid.,* § 2.

Inasmuch as things that belong to nobody are acquired by the first occupant according to the law of nations (*Inst.,* II. i. 12),[9] it follows that if there be in the earth gold or in the sea pearls or in a river anything else which is not appropriated by the law of nations those will vest in the first occupant, just as the fish in the sea do. And, indeed, there are many things in this connection which issue from the law of nations, which, because it has a sufficient derivation from natural law, is clearly capable of conferring rights and creating obligations. And even if we grant that it is not always derived from natural law, yet there exists clearly enough a consensus of the greater part of the whole world, especially in behalf of the common good of all. For if after the early days of the creation of the world or its recovery from the flood the majority of mankind decided that ambassadors should everywhere be reckoned inviolable and that the sea should be common and that prisoners of war should be made slaves, and if this, namely, that strangers should not be driven out, were deemed a desirable principle, it would certainly have the force of law, even though the rest of mankind objected thereto.—Vitoria, *De Indis,* Sec. III, no. 4

Equity and justice must be observed, in the precepts of the *ius gentium.* For such observance, is included in the essential character of every true law . . . and the rules pertaining to the *ius gentium* are indeed true law . . . and more closely related to the natural law than are those of civil law; therefore . . . it is impossible that these precepts of the *ius gentium* should be contrary to natural equity.—Suárez, *De legibus,* Book II, chap. xx, § 3.

Although international law is a portion of the divine law, which God left with us after our sin, yet we behold that light amid great darkness; and

[9] See *infra,* p. 275, under the rubric "Discovery, Possession and Occupation."

hence through error, bad habits, obstinacy, and other affections due to darkness we often cannot recognize it. . .

But truth exists, even though it be hidden in a well, and when it is diligently and faithfully sought, it can be brought forth and as a rule is brought forth. Abundant light is afforded us by the definitions which the authors and founders of our laws are unanimous in giving to this law of nations which we are investigating. For they say that the law of nations is that which is in use among all the nations of men, which native reason has established among all human beings, and which is equally observed by all mankind. Such a law is natural law. . . .

This statement, however, must not be understood to mean that all nations actually came together at a given time, and that thus the law of nations was established. The writers to whom I have referred do not make any such statement, and it is not necessary to understand the word *omnes* in such a way that when one speaks of the usage of all nations it should be considered to mean absolutely every nation; since countless numbers of these, in regions widely separated from us, utterly different in their customs, and of different tongues, remain unknown. . . . But that which has successively seemed acceptable to all men should be regarded as representing the intention and purpose of the entire world, as Ambrose once showed in a treatise of his, as did also St. Jerome. And in fact an unwritten law, such as this, is like a custom and is established in that same manner. Moreover, such unanimity cannot fail to be recognized, just as it is known that all nations and races of men are agreed as to the existence of God. . . .

If the Romans, Greeks, Jews, and barbarians, in short, all known peoples, have made use of a certain code of laws, it may be assumed that all men have made use of that same code. It is from the known that we learn the unknown. In fact, as the rule of a state and the making of its laws are in the hands of a majority of its citizens, just so is the rule of the world in the hands of the aggregation of the greater part of the world. Moreover, this is especially true of the unwritten law; for a custom is binding upon all the members of a state and is called the custom of the entire state, even if every citizen has not agreed to it, but haply some have even opposed it. . . .

There is another more elegant definition of the law of nations and it is to the same purport as that which Xenophon[10] has handed down, namely, that there are everywhere certain unwritten laws, not enacted by men (since men could not all assemble in one place, nor were they all of one speech), but given to them by God. For example, the one which takes first place with

[10] *Memorabilia* IV. iv. 19.

all men, that one should worship God; and the second, that one should honor father and mother. Such laws are not written, but inborn; we have not learned, received, and read them, but we have wrested, drawn, and forced them out of nature herself. We have not received them through instruction, but have acquired them at birth; we have gained them, not by training, but by instinct.—Gentili, *De jure belli,* Book I, chap. i.

The law of nations, both natural and simple, loves what is true, real, not invented, and not merely verbal.—*Ibid.,* Book II, chap. xvi.

Primary laws of nations are such as concern embassage, such as belong to the courteous entertainment of foreigners and strangers, such as serve for commodious traffic, and the like. Secondary laws in the same kind are such as this present unquiet world is most familiarly acquainted with; I mean laws of arms, which yet are much better known than kept.—Hooker, *Of the Laws of Ecclesiastical Polity,* I. x. 13.

The strength and virtue of that law [of nations] is such that no particular nation can lawfully prejudice the same by any their several laws and ordinances, more than a man by his private resolutions the law of the whole commonwealth or state wherein he liveth. For as civil law, being the act of the whole body politic, doth therefore overrule each several part of the same body; so there is no reason that any one commonwealth of itself should to the prejudice of another annihilate that whereupon the whole world hath agreed.—*Ibid.*

Although the civil law is not of necessity the law of nations, yet the law which belongs to the nations ought also to apply to their citizens.—Gentili, *De jure belli,* Book I, chap. iii.

Changes in the Law of Nations

The *ius gentium* is subject to change, in so far as it is dependent upon the consent of men; and in this respect . . . the *ius gentium* differs from the natural law.—Suárez, *De legibus,* Book II, chap. xx, § 6.

In this connexion, I must furthermore note that such changes may be effected in the *ius gentium* in different ways. They may occur in connexion with that phase of the said law which is common merely in that several nations agree upon the suitability of certain precepts; on the other hand, they may occur in that phase of the *ius gentium* which is common, owing to the usage and customs of [all] nations, in so far as there exists among them any fellowship or intercourse. . . .

In connexion with the other phase of the *ius gentium* (law of nations), however, changes are far more difficult, for this phase involves law common to all nations and appears to have been introduced by the authority of all, so that it may not be annulled [even in part] without universal consent. Nevertheless, there would be no inherent obstacle to change, in so far as the subject-matter of such law is concerned, if all nations should agree to the alteration, or if a custom contrary to [some established rule of this law of nations] should gradually come into practice and prevail. That event, however, although it might be conceived of as not contrary to reason, yet seems impossible, practically speaking.—*Ibid.*, §§ 7, 8.

The things prohibited by the *ius gentium* are not, absolutely speaking, evil (in themselves and intrinsically) in view of two facts: first, because the precepts in question are not deduced from natural principles by a necessary and evident inference; secondly, because the obligation imposed by the *ius gentium* does not spring from reason alone, apart from human obligation of every sort, even from that which has its source in general custom. Hence, in so far as pertains to the subject-matter of that system of law, it is not absolutely inconsistent with reason that the said law should be subjected to change, provided that the change be made on sufficient authority.—*Ibid.*, § 6.

A prince may, perhaps, enact a law contrary to the *ius gentium* by derogating from it in some matter which it is expedient not to observe in his realm and relatively to his subjects, as, for example, he might enact a law that in his realm there should be no slaves, but that all men should be free, or something similar. For this exercise of power is not opposed to [natural] reason, nor to the proper government of the state. Hence, just as a prince might enact law against another custom, so also he might make a rule contrary to that portion of the *ius gentium* which affects his government; and the reason is that, because of its universality alone, the *ius gentium* is not there the stronger or more immutable with respect to his subjects: it is so only with respect to other nations.—*Ibid.*, Book VII, chap. iv, § 8.

When once anything is established from a virtual consensus of the whole world, and admitted [as in the case of the law of nations], it is necessary that the whole world should likewise agree as to its abrogation; but . . . it is impossible that the consensus of the whole world could be obtained for the abrogation of the law of nations.—Vitoria, *De jure gentium et naturali*.[11]

[11] Trans. in J. B. Scott, *op. cit.*, Part I, Appendix E, p. cxiii.

International Community

The much-admired *Republic* of Zeno, the founder of the Stoic sect, may be summed up in this one main principle: that all the inhabitants of this world of ours should not live differentiated by their respective rules of justice into separate cities and communities, but that we should consider all men to be of one community and one polity, and that we should have a common life and an order common to us all, even as a herd that feeds together and shares the pasturage of a common field. This Zeno wrote, giving shape to a dream or, as it were, shadowy picture of a well-ordered and philosophic commonwealth.—Plutarch, *Moralia,* "On the Fortune or the Virtue of Alexander," § 6.

The unanimity of the races of the world must be regarded as a law of nature.—Cicero, *Tusculan Disputations,* I. xiii. 30.

It is our duty to respect, defend, and maintain the common bonds of union and fellowship subsisting between all the members of the human race.—Cicero, *De officiis* I. xli. 149.

The justice of mankind at large . . . is rooted in the social union of the race of men.—Cicero, *Tusculan Disputations,* I. xxvi. 64.

In the whole moral sphere of which we are speaking there is nothing more glorious nor of wider range than the solidarity of mankind, that species of alliance and partnership of interests and that actual affection which exists between man and man, which, coming into existence immediately upon our birth, owing to the fact that children are loved by their parents and the family as a whole, is bound together by the ties of marriage and parenthood, gradually spreads its influence beyond the home, first by blood relationships, then by connections through marriage, later by friendships, afterwards by the bonds of neighborhood, then to fellow-citizens and political allies and friends, and lastly by embracing the whole of the human race. This sentiment, assigning each his own and maintaining with generosity and equity that human solidarity and alliance of which I speak, is termed Justice; connected with it are dutiful affection, kindness, liberality, good-will, courtesy and the other graces of the same kind. And while these belong peculiarly to Justice, they are also factors shared by the remaining virtues. For human nature is so constituted at birth as to possess an innate element of civic and national feeling, termed in Greek *politikon;* consequently all the actions of every virtue will be in harmony with the human

affection and solidarity I have described, and Justice in turn will diffuse its agency through the other virtues, and so will aim at the promotion of these. For only a brave and a wise man can preserve Justice.—Cicero, *De finibus* V. xxiii. 65–66.

Nothing is so conducive to greatness of mind as the ability to examine systematically and honestly everything that meets us in life, and to regard these things always in such a way as to form a conception of the kind of Universe they belong to, and of the use which the thing in question subserves in it; what value it has for the whole Universe and what for man, citizen as he is of the highest state, of which all other states are but as households.—Marcus Aurelius Antoninus, *The Communings with Himself,* III. 11.

If the intellectual capacity is common to us all, common too is the reason, which makes us rational creatures. If so, that reason also is common which tells us to do or not to do. If so, law also is common. If so, we are citizens. If so, we are fellow-members of an organised community. If so, the Universe is as it were a state—for of what other single polity can the whole race of mankind be said to be fellow-members?—and from it, this common State, we get the intellectual, the rational, and the legal instinct.—*Ibid.,* IV. 4.

Let us grasp the idea that there are two commonwealths—the one, a vast and truly common state, which embraces alike gods and men, in which we look neither to this corner of earth nor to that, but measure the bounds of our citizenship by the path of the sun; the other, the one to which we have been assigned by the accident of birth. This will be the commonwealth of the Athenians or of the Carthaginians, or of any other city that belongs, not to all, but to some particular race of men.—Seneca, *De otio* iv. 1.

After the state or city comes the world, the third circle of human society, —the first being the house, and the second the city.—St. Augustine, *De civitate Dei* XIX. vii.

A house (*domus*) is the dwelling place of a single family, as a city is of a single people, as the world is the domicile of all mankind.—Isidore, *Etymologies,* Book IX, chap. iv, § 3.

There are three societies—of families, of cities, and of nations.—*Ibid.,* Book XV, chap. ii, § 2.

Just as one man at his best in body and spirit is a concord of a certain kind, and as a household, a city, and a kingdom is likewise a concord, so it is with mankind in its totality. Therefore the human race for its best disposition is dependent on unity in wills.—Dante, *De monarchia* I. xv. 3.

Wherever strife is a possibility, in that place must be judgment; otherwise imperfection would exist without its perfecting agent. This could not be, for God and Nature are not wanting in necessary things. It is self-evident that between two princes, neither of whom owes allegiance to the other, controversy may arise either by their own fault or by the fault of their subjects. For such, judgment is necessary. And inasmuch as one owing no allegiance to the other can recognize no authority in him (for an equal cannot control an equal), there must be a third prince with more ample jurisdiction, who may govern both within the circle of his right. This prince will be or will not be a Monarch.—*Ibid.*, x. 1.

The necessity of man's social state . . . is ordained for a single end, namely, a life of happiness; to which no one is able to attain by himself without the aid of some one else, inasmuch as man has need of many things for which a single individual cannot suffice. And therefore the Philosopher says that man is by nature a "companionable animal." And just as an individual in order to suffice for himself requires the domestic companionship of the family, so a household to suffice for itself requires a neighborhood, else it will suffer from many defects which will be hindrances to happiness. And because a single neighborhood cannot in all respects be self-sufficient, in order to satisfy all its wants there must needs be a city. Moreover a city, for the sake of its crafts and for self-defence, must needs have intercourse and brotherly relations with the neighboring townships, and for this reason kingdoms were constituted. Wherefore, inasmuch as the mind of man does not rest content with a limited possession of land, but always desires to acquire more land, as we perceive by experience, disagreement and wars must needs arise between kingdom and kingdom. Such things are the scourges of townships, and through townships of neighborhoods, and through neighborhoods of families, and through families of individuals, and thus happiness is hindered. Wherefore, in order to do away with these wars and their causes, it is necessary that the whole earth, and all that is given to the race of man to possess, should be a monarchy, that is to say, a single princedom; and should have a single prince, who, possessing everything, and having nothing left to desire, should keep kings confined within the borders of their kingdoms, so that peace should reign between them, and townships

should rest in peace, and while they so rest neighborhoods should love each other, and in this mutual love families should satisfy all their wants; and when these are satisfied, a man should live happily, which is the end for which he is born.—Dante, *Convivio,* Tractate IV, iv.

From all that has been said, a corollary may be inferred, namely: that international law has not only the force of a pact and agreement among men, but also the force of a law; for the world as a whole, being in a way one single State, has the power to create laws that are just and fitting for all persons, as are the rules of international law. Consequently, it is clear that they who violate these international rules, whether in peace or in war, commit a mortal sin; moreover, in the gravest matters, such as the inviolability of ambassadors, it is not permissible for one country to refuse to be bound by international law, the latter having been established by the authority of the whole world.—Vitoria, *De potestate civili,* no. 21.

There is a certain natural form of community, brought about solely through the conformity of its members in rational nature. Of this sort, is the community of humankind, which is found among all men.—Suárez, *De legibus,* Book I, chap. vi, § 18.

The rational basis . . . of this phase of law consists in the fact that the human race, howsoever many the various peoples and kingdoms into which it may be divided, always preserves a certain unity . . . enjoined by the natural precept of mutual love and mercy; a precept which applies to all, even to strangers of every nation.

Therefore, although a given sovereign state, commonwealth, or kingdom, may constitute a perfect community in itself, consisting of its own members, nevertheless, each one of these states is also, in a certain sense, and viewed in relation to the human race, a member of that universal society; for these states when standing alone are never so self-sufficient that they do not require some mutual assistance, association, and intercourse, at times for their own greater welfare and advantage, but at other times because also of some moral necessity or need. This fact is made manifest by actual usage.

Consequently, such communities have need of some system of law whereby they may be directed and properly ordered with regard to this kind of intercourse and association; and although that guidance is in large measure provided by natural reason, it is not provided in sufficient measure and in a direct manner with respect to all matters; therefore, it was possible for

certain special rules of law to be introduced through the practice of these same nations. For just as in one state or province law is introduced by custom, so among the human race as a whole it was possible for laws to be introduced by the habitual conduct of nations. This was the more feasible because the matters comprised within the law in question are few, very closely related to natural law and most easily deduced therefrom in a manner so advantageous and so in harmony with nature itself that, while this derivation [of the law of nations from the natural law] may not be self-evident—that is, not essentially and absolutely required for moral rectitude—it is nevertheless quite in accord with nature, and universally acceptable for its own sake.—Suárez, *De legibus,* Book II, chap. xix, § 9.

The Stoics maintained that the whole world formed one state, and that all men were fellow citizens and fellow townsmen, like a single herd feeding in a common pasture. All this universe which you see, in which things divine and human are included, is one, and we are members of a great body. And in truth the world is one body. Moreover, nature has made us all kindred, since we have the same origin and the same abode. She has implanted in us love for one another and made us inclined to union. . . .

The rule which governs a private citizen in his own state ought to govern a public citizen, that is to say a sovereign or a sovereign people, in this public and universal state formed by the world.—Gentili, *De jure belli,* Book I, chap. xv.

International Agreements

There were three kinds of treaties, he [Menippus] said, by which states and kings concluded friendships: one, when in time of war terms were imposed upon the conquered; for when everything was surrendered to him who was the more powerful in arms, it is the victor's right and privilege to decide what of the conquered's property he wishes to confiscate; the second, when states that are equally matched in war conclude peace and friendship on terms of equality; under these conditions demands for restitution are made and granted by mutual agreement, and if the ownership of any property has been rendered uncertain by the war, these questions are settled according to the rules of traditional law or the convenience of each party; the third exists when states that have never been at war come together to pledge mutual friendship in a treaty of alliance; neither party gives or accepts conditions.—Livy, XXXIX. lvii. 7–9.

A treaty of peace turns an enemy into a friend.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. vi, § 3.

A peace-treaty (*foedus*) is a peace which is entered into between contending parties, and is so called either from faith (*a fide*), or from the fetials (*a fetialibus*), that is, the priests. For treaties of peace were made by these, just as wars were made by laymen (*per saeculares*). Others think that peace-treaties (*foedera*) take their name from the pig foully (*foede*) and cruelly slain, the death of which was wished for him who departed from the peace. Virgil says (*Aeneid,* Book VIII, line 641):

> . . . made covenant o'er sacrifice of swine
> (. . . *Et caesa iungebant foedera porca.*)
> —Isidore, *Etymologies,* Book XVIII, chap. i, § 11.

Likewise, treaties of peace and truces may be placed under this head [that is, under the law of nations, or *ius gentium* in the strict sense of the term]; not in so far as relates to the obligation to observe such treaties after they are made, since this obligation pertains rather to the natural law, but in so far as [offers of] such treaties should be heeded and not refused, when presented in due manner and for a reasonable cause. For while such compliance is to a great degree in harmony with natural reason, it appears to be still more firmly established by usage itself and by the law of nations, [thus] falling under a more binding obligation.—Suárez, *De legibus,* Book II, chap. xix, § 8.

There are two kinds of alliance, called by the Greeks respectively συμμαχία and ἐπιμαχία, the one when both parties have the same friends and enemies, an obligation under which the Romans regularly put their allies; the other a kind of half union, by which we are under obligation to render aid to an ally if he is wronged, but do not aid him in inflicting injury or in an offensive war. But not even in the former kind of alliance is it understood that an ally is bound to furnish aid whether the cause be just or unjust; for an alliance is not supposed to exist for the purpose of injustice nor confederates to be united for an unlawful war.—Gentili, *De jure belli,* Book III, chap. xviii.

Princes may not make agreements to the detriment of their kingdom, since they were entrusted with its defence, not with its dilapidation.—*Ibid.,* chap. xxii.

If the treaties are between two peoples, the successors will always be bound, since a people is always the same; "princes are mortal, commonwealths immortal."—*Ibid.*

As regards treaties . . . and other public agreements into which a man enters not on his own behalf, but on behalf of the State (which is just as effectually represented by subsequent officials as by those of today), we must declare that a prince is entirely bound by his deceased predecessor's contract and that the parties to the treaty continue to be subject to it. . . .

It is, however, the general opinion that if such a treaty is a cause of very great injury to the State, the succeeding prince is not bound by it. Herein I agree, provided that the treaty relates to the transfer of something appurtenant to the royal crown and has been made without the requisite consent of the people or estates, or if the treaty derogates from the royal prerogative, for the deceased prince would not be competent to effect this; and such a treaty would be quite devoid of force right away from its inception.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. viii, § 10.

I agree with a most learned theologian of our generation,[12] who says that it is never right to make an alliance with infidels, although peace may be made and kept with them.—Gentili, *De jure belli,* Book III, chap. xix.

With men of a different religion . . . I say that a general agreement concerning commerce is lawful, and also a special treaty for that purpose. . . . I also say that it is lawful to bind those of a different religion by treaties with unequal terms.—*Ibid.*

A compact whether of alliance or of peace or of truce, is void if it has been obtained by fraud.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. vi, § 22.

Whatever . . . is confirmed by the addition of an oath and the invocation of God's name—whether it be a promise of clemency to an enemy or of pardon to the guilty or of reward for good conduct to the troops—must not be brought to naught by any consideration of expediency or by any fear of danger. A declaration, to the good faith of which God has been invoked as witness, must stand fixed and unchangeable.—*Ibid.,* § 3.

In making a contract it is not lawful to lie to the enemy.—Gentili, *De jure belli,* Book II, chap. v.

The wording of our agreements with our enemies should be free from every kind of trickery; for all such agreements with princes or with their procurators are made in good faith and by no means admit of knotty inter-

[12] Peter Martyr, *On I Kings xv.*

pretations and disputes about points of law; that is to say, about subtleties. Hence they ought to be wholly free from any evil intent and to have regard solely to the truth, which the law of nations cultivates and in the train of which, but not in that of subtlety, follows good faith.—*Ibid.*, chap. iv.

All the dealings of a sovereign are upon the basis of right and justice (*ex bono et aequo*); all are dependent on the customs and institutions of the nations, according to the accepted view of all the interpreters. More abundant faith is demanded in the contracts of princes, as Baldus himself says; and the name of treaty (*foedus*) is by some derived from faith (*fides*). —*Ibid.*, Book III, chap. xiv.

The agreements between princes are like those among private individuals, and princes conduct themselves in such cases as private citizens.—*Ibid.*

One must keep his agreement who makes one because he is conquered in war; and the same thing applies to the agreements of prisoners of war.— *Ibid.*

Although individuals are not included in a treaty in such a manner that they can break the peace for the whole people, yet they are included to the extent that they must not themselves do anything contrary to the peace of the state. And the states themselves must provide against this; otherwise what prevents a great multitude from violating a treaty with impunity?— *Ibid.*, chap. xxiii.

[Joined with] the power to make peace or grant truces . . . is the obligation not to violate treaties of peace, or harm the enemy during a period of truce.—Suárez, *De legibus,* Book II, chap. xviii, § 5.

The only difference between peace and a truce is that the one is perpetual, the other temporary, but the time involved neither intensifies nor diminishes the quality of the obligation. And exactly as peace is destroyed when one or the other party breaks faith, so also the dissolution of a truce is held to result, for, underlying each case is a common factor, i.e., a breach of faith; and no one ought, by his own guile or delict, to be a gainer or cause injury to others.—Ayala, *De jure et officiis et disciplina militari,* Book I, chap. vi, § 18.

Neither a peace nor a truce is broken by judicial controversies.—Gentili, *De jure belli,* Book III, chap. xxiv.

One is not accused of having broken the peace who has acted contrary to the terms of the peace, but has paid the penalty according to the agreement; for the paying of the penalty is equivalent to observing the compact. —Gentili, *De jure belli,* Book III, chap. xxiv.

A treaty is not violated if one departs from its provisions for a legitimate reason.—*Ibid.*

Certainly necessity and superior force will excuse an ally from being considered a breaker of treaties. But he must also give warning to the other ally that he does not intend to abide by the letter of the law. Yet this latter ally cannot be accused of violation of the treaty, if he departs from it because of the failure to observe some of its conditions. And yet, before departing from the agreement, he ought to understand whether the conditions were not observed by the other ally through his fault or through treachery, and presently also to take steps that he may observe them. For this is regarded as most just in private contracts and as most usual.—*Ibid.*

The peace will not be said to be broken if the failure to observe a given condition does not result in offence; for example, if it was promised that something should be done within a given number of days, and it was not done.—*Ibid.*

If an alliance is abandoned because of some reason of state which arises, no charge may be brought against the ally.—*Ibid.*

As to whether it is permissible in war to break faith plighted with the enemy . . . generally speaking, such an act is not permissible, since it involves patent injustice; and consequently, if the enemy suffers loss for this reason, full reparation should be made. However, . . . if one side has perchance broken faith, the other side will be entirely freed from its own obligation. For the equity of law demands that this condition be understood to exist.—Suárez, *De bello,* sec. vii, no. 23.

What if one has been a treaty breaker more than once? It necessarily follows that any one who trusts him is the most foolish of all creatures.—Gentili, *De jure belli,* Book III, chap. xxiv.

What is the punishment of those who violate treaties? . . . The punishment provided by the law . . . is as severe as the will of the victor may dictate.—*Ibid.*

Sometimes . . . it is provided in treaties and expressly stated, either that such men [fugitives] are to be returned, or that they are not. And it is always better to be explicit on this point.—*Ibid.*, chap. xxiii.

Arbitration and Judicial Settlement

The Corinthians say that Poseidon had a dispute with Helius (*Sun*) about the land, and that Briareos arbitrated between them, assigning to Poseidon the Isthmus and the parts adjoining, and giving to Helius the height above the city.

Ever since, they say, the Isthmus has belonged to Poseidon.[13]—Pausanias, *Description of Greece* [Corinth, I. 6].

Damophon, it is said, when tyrant of Pisa did much grievous harm to the Eleans. But when he died, since the people of Pisa refused to participate as a people in their tyrant's sins, and the Eleans too became quite ready to lay aside their grievances, they chose a woman from each of the sixteen cities of Elis still inhabited at that time to settle their differences, this woman to be the oldest, the most noble, and the most esteemed of all the women. The cities from which they chose the women were Elis. . . .[14] The women from these cities made peace between Pisa and Elis.—*Ibid.* [Elis, I. xvi. 5–6].

Most men rush into war and proceed to blows first, although that ought to be the last resort, and then, when they are in distress, at length have recourse to words. But since we ourselves are not as yet involved in any such error and see that you are not, we urge you, while wise counsels are still a matter of free choice to both of us, not to violate the treaty or transgress your oaths, but to let our differences be settled by arbitration according to the agreement.—Thucydides, *History of the Peloponnesian War* [The Athenians to the Lacedaemonians], I. lxxviii.

At the opening of spring in the following summer season, the Lacedaemonians and Athenians at once concluded an armistice for a year . . . on the following terms: . . .

[13] This mythical case is but one of several legendary arbitrations related by Pausanias and other Greek writers. Whatever may have been the origin of these accounts of arbitral settlements in the heroic age, it is well known that in historical times arbitration was a familiar institution in Greece. See, for example, Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome*, Vol. II, chap. xx, and especially the masterly treatment of the subject by A. Raeder, *L'Arbitrage international chez les Hellènes* (publication de l'Institut Nobel Norvegien, Christiania, 1912); and that by Marcus Niebuhr Tod, *International Arbitration amongst the Greeks* (Oxford, 1913).

[14] Here there is a gap in the text.

"The following agreements also are made by the Lacedaemonians and the rest of the confederates, that in case the Athenians make a treaty, we shall each of us remain on our own territory, keeping what we now have: . . .

"There shall be safe conduct for herald and envoys and their attendants, as many as shall seem proper, on their way to the Peloponnesus and to Athens for the purpose of bringing the war to an end and for the arbitration of disputes, both going and coming, by land and by sea.

"Deserters shall not be received during this time, whether freemen or slaves, either by you or by us.

"You shall give satisfaction to us and we to you according to our ancestral customs, settling disputed points by arbitration without war.

"To the Lacedaemonians and their allies these things seem good; but if anything seems to you fairer or juster than these things, come to Lacedaemon and set forth your view; for neither the Lacedaemonians nor their allies will reject any just proposal you may make. And let those who come come with full powers, as you also desired of us. And the truce shall be for a year."—Thucydides, *History of the Peloponnesian War,* IV. cxvii. 1, 3; cxviii. 4, 6–10.

The Argives . . . concluded a treaty and an alliance with the Lacedaemonians to this effect:

"It has seemed good to the Lacedaemonians and the Argives to conclude a treaty and an alliance for fifty years on the following terms:

1. "They shall offer settlements by law under conditions that are fair and impartial, according to hereditary usage. . . .

4. "If there be any dispute on the part of any one of the cities, either of those within the Peloponnesus or without, whether about boundaries or anything else, the matter shall be judicially decided. But if any city of the allies quarrel with another, they shall appeal to some city which both deem to be impartial."—*Ibid.,* V. lxxix.

A judgment deals with a definite sum, arbitration with an indefinite sum. We come before a judge on the understanding that we either gain or lose the suit entirely; we come before an arbitrator with the expectation, neither of losing everything nor of getting as much as we asked.—Cicero, *Pro Quinto Roscio comoedo* iv. 10.

He is called an arbiter in whose hands several persons have deposited property which is in dispute, whether he has been appointed by a judge, to whom application had been made; or whether the property has been submitted to him for arbitration by those who claim it.—*Digest* L. xvi. 110.

Where anyone has been appointed an arbiter in a matter in which he himself is interested, he cannot make an award, because he would order himself to do something, or forbid himself to bring suit; for no one can command himself to perform an act, or prohibit himself from doing it.—*Ibid.*, IV. viii. 5[1].

An arbiter can do nothing beyond what is stated in the agreement for arbitration.—*Ibid.*, 32, § 21.

In treating of the duties of an arbiter it must be remembered that the entire subject depends upon the terms of the agreement for arbitration, since the arbiter can lawfully perform no other act except what was provided that he should perform; and, therefore, he cannot decide anything he pleases, nor with reference to any matter that he pleases, but only what was set forth in the agreement for arbitration, and in compliance with the terms of the same.—*Ibid.* § 15.

The award of the arbiter which he makes with reference to the matter in dispute should be complied with, whether it is just or unjust; because the party who accepted the arbitration had only himself to blame, as was stated in a Rescript by the Divine Pius, as follows: "The party must submit to the award with equanimity, even though it may be by no means well founded."—*Ibid.*, 27, § 2.

In human affairs a man may submit of his own accord to the judgment of others although these be not his superiors, an example of which is when parties agree to a settlement by arbitrators. Wherefore it is necessary that the arbitrator should be upheld by a penalty, since the arbitrators through not exercising authority in the case, have not of themselves full power of coercion.—St. Thomas Aquinas, II.–II, qu. 67, art. 2, ad 2.

When princes are at variance with one another about some right of sovereignty and are rushing into war, he [the Pope] can act as judge and inquire into the claims of the parties and deliver judgment, a judgment which the princes are bound to respect, lest those numerous spiritual evils should befall which are the inevitable results of a war between Christian princes.—Vitoria, *De Indis,* Sec. II, no. 5.

The Supreme Pontiff, although he has no direct power in temporal affairs outside of his own domain, nevertheless does possess such power indirectly, as is indicated in certain passages of the *Decretals* (I. vi. 34; II. i. 13). There-

fore, under this title, he has a right to require that a cause of war be referred to him, and the power to give a judgment thereon, which the parties in question are bound to obey, unless his decision be manifestly unjust. For such [authority on the part of the Pope] is certainly necessary for the spiritual welfare of the Church and for the avoidance of almost infinite evils.—Suárez, *De bello,* sec. ii, no. 5.

Princes are bound to avoid war in so far as is possible, and by upright means. Therefore, if no danger of injustice is to be feared, [arbitration] . . . is plainly the best means of decision, and consequently . . . resort should be had to it.—*Ibid.,* sec. vi, no. 5.

It is impossible that the Author of nature should have left human affairs, governed as they are by conjecture more frequently than by any sure reason, in such a critical condition that all controversies between sovereigns and states should be settled only by war; for such a condition would be contrary to prudence and to the general welfare of the human race; and therefore, it would be contrary to justice. Furthermore, if this condition prevailed, those persons would as a rule possess the greater rights who were the more powerful; and thus such rights would have to be measured by arms, which is manifestly a barbarous and absurd supposition.

In this connection, however, we must observe, first, that a sovereign prince is not bound by the decision of those whom he himself has not constituted as judges. Therefore, it would be necessary for the arbitrators to be chosen with the consent of both sides. Resort to this method, indeed, is a most rare occurrence, inasmuch as [these princes] seldom favor it; for very frequently one or other of the princes holds the foreign judges in suspicion.—*Ibid.,* sec. vi, nos. 5–6.

Whereas there are two modes of contention, one by argument and the other by force, one should not resort to the latter if it is possible to use the former. . .

Why should the disputes of private individuals be settled by arbitration and those of sovereigns not be thus decided, when the former are often greater than these public ones, or at any rate much less clear. It is better and more worthy of a citizen, says the law, not to use the compulsion of force. In the disputes of sovereigns more experienced judges can be secured and those who are less corruptible, will hear and decide the cases with the whole world, as it were, for witnesses and spectators.—Gentili, *De jure belli,* Book I, chap. iii.

Ambassadors

It was after the separation of the nations, the foundation of kingdoms, the partition of dominions, and the establishment of commerce that the institution of embassies arose.—Gentili, *De legationibus,* Book I, chap. xx.

There is one kind of positive law taken from private agreement and consensus, and another kind taken from public agreement. In like manner we say of the *jus gentium* that a certain kind of *jus gentium* is from the common consensus of all peoples and nations, and in that way ambassadors have come to be admitted under the *jus gentium,* and are inviolable among all nations.—Vitoria, *De jure gentium et naturali.*[15]

Since it was inevitable that obligations and negotiations should arise between organizations having such reciprocity of rights as exists between nations, commonwealths and kings, and since those organizations are either unwilling or, as often happens, unable to meet (certainly states can not meet) it was absolutely necessary . . . that others should be appointed, who by representing the organizations would be able to transact the necessary business. These representatives, moreover, had to be persons such as we see ambassadors are, that is, persons not subject to him to whom they are sent. Otherwise the distinction of sovereignties would not be kept intact.—Gentili, *De legationibus,* Book I, chap. xx.

Of a truth . . . concessions to ambassadors are made with the utmost reasonableness, in order that representatives of each side may be in a position to treat with safety about the terms of a peace or a treaty or a truce. They frequently lay very big controversies to rest by means of a little labor.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. ix, § 2.

Every state has the right of sending ambassadors to treat of peace with another state, and consequently the former has the right of protecting those ambassadors and of avenging an injury if they are ill treated.—Suárez, *De mediis,* sec. i, no. 4.

By the law of nature, if wars should arise, it is the public business to bring about a peace by the sending of ambassadors.—Vitoria, *De jure gentium et naturali.*[16]

The mission of ambassadors is one of peace (on which account they themselves may be expected to deal peacefully with all). . . . They represent

[15] Trans. in J. B. Scott, *The Spanish Origin of International Law,* Part I, Appendix E, pp. cxii–cxiii.

[16] Trans. in J. B. Scott, *ibid.,* Part I, Appendix E, p. cxiii.

a prince or a state. They have charge of public business. From being sacred they presently become sacrosanct and inviolable, even in the sight of an enemy.—Gentili, *De legationibus,* Book II, chap. iii.

Prohibition [of embassies] should be based on some reason, for without reason the eternal laws of nations can not be changed or abolished by anyone. . . . If the transaction of business is interfered with, if the dignity of the state is slighted, if danger of any kind arises from the privilege of sending ambassadors—these and similar conditions are without question adequate reasons for prohibiting the exercise of the privilege.—*Ibid.,* chap. v.

I am . . . very strongly of the opinion that the rights of embassy ought not to be disturbed on account of religious differences. . . . No matter what difference in religion may exist, the rights of embassies remain unshaken.—*Ibid.,* chap. xi.

When anyone strikes the envoy of our enemy, he is considered to be guilty of an act against the Law of Nations, because envoys are considered sacred. Therefore, if any ambassadors of a nation with whom we are at war are with us, it has been established that they are free to remain; for this is in conformity with the Law of Nations.—*Digest* L. vii. 17.

If war suddenly breaks out between two princes, their ambassadors retain at each other's court unrestricted liberty, which is not the lot of others who, if caught in the country of the enemy of their prince, become his slaves. At such a time, if a sovereign does not want ambassadors to remain in his kingdom, they are ordered to depart. . . . Nor is the duty of the prince confined to precautions that the ambassador shall not be injured by him, nor through any plan of his, but he must take care that he shall not suffer injury from anyone else.—Gentili, *De legationibus,* Book II, chap. xiii.

For the custom of receiving ambassadors under a law of immunity and security, if considered in an absolute aspect, does not spring from any necessity of the natural law, since any community of men might have failed to have within its territory any ambassador of a foreign community, or it might have been unwilling to receive such ambassadors; yet this reception is an obligation imposed by the *ius gentium,* and to repudiate those ambassadors would be a sign of enmity and a violation of the *ius gentium,* although it would not be an injury committed in contravention of natural reason. Accordingly, even though it would be contrary to the natural law not to respect their immunity, for the reason that such an act would be

contrary to justice and due good faith, if we assume that they have been received on the basis of some implied agreement, nevertheless that assumption and that implied agreement would have been introduced by the *ius gentium* under the conditions stated.—Suárez, *De legibus,* Book II, chap. xix, § 7.

Ambassadors are entitled to the good faith of the state and the prince, and he who does violence to an ambassador violates the good faith of the state and the prince.—Gentili, *De legationibus,* Book II, chap. xiii.

Every sovereign ought to show many courtesies to ambassadors, even when they are not accredited to him.—*Ibid.,* chap. iii.

An outrage offered to ambassadors is deemed offered to the king or State whose embassage they are carrying out.—Ayala, *De jure et officiis et disciplina militari,* Book I, chap. ix, § 2.

The right of embassy does not hold for the envoy of a sovereign who has violated that right. To withhold rights from one who has violated them is believed to be not a violation but a rendering of justice.—Gentili, *De legationibus,* Book II, chap. vi.

An ambassador assumes equality with the sovereign to whom he is accredited, and he is not bound by civil regulations or by any civil ordinance of that sovereign.—*Ibid.,* chap. x.

The paraphernalia of ambassadors . . . are safe-guarded by the right of embassy.—*Ibid.,* chap. xv.

If an opportunity for the transaction of the business of the embassy should be spoiled through delays caused by safeguarding its rights, one should tolerate the loss of these privileges rather than suffer the whole embassy to come to naught.—*Ibid.,* Book III, chap. xx.

It is well established that if ambassadors are to be tried, they can be tried only under international law. The immediate inference from this is that certain acts, which are offenses in the case of persons subject to the civil law, are not offenses in the case of ambassadors; and that the acts of the latter are to a certain extent on a different basis.—*Ibid.,* Book II, chap. xiii.

That dismissal is the proper treatment for an ambassador [guilty of conspiracy] is the conclusion I have come to after a study of the soundest principles and precedents.—*Ibid.,* chap. xviii.

In dealing with an ambassador who is a spy, I do not believe that severity can be carried beyond the point of refusing to admit him, or if he has been admitted, of expelling him.—Gentili, *De legationibus,* Book II, chap. iv.

Someone may add that just as ambassadors are not infrequently deceived, so they also ought to be able to deceive others. But I say that the deception of ambassadors is unjust.—*Ibid.*

The ambassador should keep in mind the fact that he is doing his duty best when he is keeping within the limits of that duty.—*Ibid.,* chap. xvi.

In a case where definite instructions have been given, ambassadors should not be allowed to diverge even a finger's breadth from them.—*Ibid.*

Circumstances . . . sometimes demand that no definite instructions shall be given to the ambassador, but that full power of doing whatever he believes to be wise under the circumstances shall be delegated to him. . . . In ambassadors of this kind the greatest prudence is requisite. All men cannot perform such embassies equally well. Sovereigns should pay strict attention to the appointment of such ambassadors.—*Ibid.,* chap. xvii.

Prudence and dignity are prime requisites in an ambassador.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. ix, § 7.

The ambassador will never be at a loss to reply, speak, and act with decision and effectiveness, if he will use shrewdness and diligence in meditating beforehand what objections can be urged, what remarks made or action taken in regard to himself and his embassy. When has the man who is prepared been found wanting? His efforts will be aided in no small degree by an attentive observation of the words and actions of ambassadors and others in similar situations. . . . Compactness is becoming in the discourse of the ambassador, and he should be famous for the weight of his opinions and the soundness of his reasoning, rather than for elaborate diction and discursive amplification.—Gentili, *De legationibus,* Book III, chaps. v and vi.

If the ambassador has dignity in expounding his mission and expressing his opinion, if he has a certain natural impressiveness, if he has prudence, if his manner of speaking has some measure of elegance and erudition, and in short, if he has enough eloquence to enable him to perform adequately the duties of his office, nothing more, in my opinion, should be demanded of him.—*Ibid.,* chap. vi.

The art of winning friendships . . . is the greatest art of ambassadors.—*Ibid.*

The ambassador . . . should learn some living languages, either the better known ones, or those which by reason of international trade relations, opportunities occasioned by propinquity, or some other cause may be useful. . . . Our ambassador ought to understand three languages . . . and if he can, one or two more. . . . We consider a knowledge of history also as desirable for ambassadors. . . . I want the ambassador to study not ancient history only, but modern history as well. . . . But it is necessary that we add to the knowledge of history that branch of philosophy which deals with morals and politics. . . . I do not want a highly elaborate literary training, and, if you please, am even opposed to it. My reasons are sound. . . . I regard as the best ambassador the man who is equipped for all kinds of embassies. Is one who is buried in books, of this type? If he is, then assuredly an owl, when exposed to the light, can see.—*Ibid.*, chaps. vii–x.

Fidelity, fortitude, temperance, and prudence. To these virtues the mind of the ambassador must be molded and trained. . . . Another virtue with which . . . the ambassador ought to be endowed is courage. . . . We want the ambassador to pursue temperance in such a way that he shall never at any time, by word or deed, compromise the dignity of the office he is filling.—*Ibid.*, chaps. xi–xiii.

The contention that ambassadors ought to refrain from accepting presents is clearly established by the fact that the laws of all nations have provided against the practice.—*Ibid.*, chap. xiii.

In regard to prudence, by which I here mean the virtue that manifests itself in a shrewd analysis of the truth, I lay down the principle that it seems to be specially requisite in an ambassador. . . . The ambassador, therefore . . . ought not to assent to things at random, but should devote time and care to their consideration. . . . In order to be sure of the ambassador's having prudence, I should want him to be a man of mature age, and with experience in foreign travel.—*Ibid.*, chap. xiv.

I should require these qualifications in addition to that which we have already mentioned: that he ought to be one who has had long training in public business. . . . Why should we send to foreigners one without experience in foreign affairs?—*Ibid.*

The ambassador need not be able to speak on every topic, but he certainly should be able to speak well on those subjects which fall within the departments of politics and civics. Moreover, he must speak in a style that is philosophical rather than rhetorical, and it should be in the native tongue of the person whom he is addressing. He must pay great attention to history of all kinds. He ought to have also some knowledge of civil law and of sound philosophy. He must feel that the highest kind of loyalty is due from him, and he should manifest this loyalty. Nor should he ever by cavil of any kind swerve from this, for it is the most important part of his office. —Gentili, *De legationibus,* Book III, chap. xxiii.

I want ambassadors to have a high and worthy spirit, not only in great affairs but in everything, and to refuse to tolerate the slightest infringement of their dignity.—*Ibid,* chap. xix.

The perfect ambassador is one who can accomplish efficiently the business and duties which have been assigned to him or which he himself has recognized the necessity of undertaking. He ought to understand to which class of ambassador he belongs, so as not to assume the wrong rôle. He should himself always comply with the conventionalities and customs of the office which he has assumed, and should insist upon others observing them in their dealings with him. He should know the rights of embassy—their extent and their character—so as to have them ready for immediate application, and it should be his aim to guard their sanctity and sacred associations. His equipment and suite should be marked by a splendor commensurate with the dignity of him who has sent him, and his birth and present position should be of distinction.—*Ibid.,* chap. xxii.

Sometimes, indeed, embassages have been intrusted to women with the greatest profit and utility to the State.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. ix, § 8.

Freedom of the Seas

It was to the common good that traffic on the sea should be open to all.- Seneca, *De beneficiis* IV. xxviii. 3.

I shall now speak about the sea. This is by nature open to all men and its use is common to all, like that of the air. It cannot therefore be shut off by any one. Its shores, too, are by nature accessible to all, as well as the banks of rivers and rivers themselves, that is to say, running waters.—Gentili, *De jure belli,* Book I, chap. xix.

It is a universal law that the sea and its use are common to all.—Grotius, *Mare liberum,* chap. vii.

Things which are called "public" are, according to the Laws of the law of nations, the common property of all, and the private property of none. The air belongs to this class of things for two reasons. First, it is not susceptible of occupation; and secondly its common use is destined for all men. For the same reasons the sea is common to all, because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries. . . . Although those things are with reason said to be *res nullius,* so far as private ownership is concerned, still they differ very much from those things which, though also *res nullius,* have not been marked out for common use, such for example as wild animals, fish, and birds. For if any one seizes those things and assumes possession of them, they can become objects of private ownership, but the things in the former category by the consensus of opinion of all mankind are forever exempt from such private ownership on account of their susceptibility to universal use; and as they belong to all they cannot be taken away from all by any one person any more than what is mine can be taken away from me by you. And Cicero says that one of the first gifts of Justice is the use of common property for common benefit. The Scholastics would define one of these categories as common in an affirmative, the other in a privative sense. This distinction is not only familiar to jurists, but it also expresses the popular belief. . . .

Therefore the sea can in no way become the private property of any one, because nature not only allows but enjoins its common use. Neither can the shore become the private property of any one. The following qualification, however, must be made. If any part of these things is by nature susceptible of occupation, it may become the property of the one who occupied it only so far as such occupation does not affect its common use.—*Ibid.,* chap. v.

In the legal phraseology of the Law of Nations, the sea is called indifferently the property of no one (*res nullius*), or a common possession (*res communis*), or public property (*res publica*).—*Ibid.*

Neither a nation nor an individual can establish any right of private ownership over the sea itself (I except inlets of the sea), inasmuch as its occupation is not permissible either by nature or on grounds of public utility.—*Ibid.*

It is repugnant to the law of nature . . . for any one to have as his own private property either the sea or its use.—*Ibid.,* chap. vi.

The sea is one of those things which is not an article of merchandise, and which cannot become private property. Hence it follows, to speak strictly, that no part of the sea can be considered as the territory of any people whatsoever. . . . A nation can take possession of a river, as it is inclosed within their boundaries, with the sea, they cannot do so.—Grotius, *Mare liberum*, chap. v.

We recognize . . . that certain peoples have agreed that pirates captured in this or in that part of the sea should come under the jurisdiction of this state or of that, and further that certain convenient limits of distinct jurisdiction have been apportioned on the sea. Now, this agreement does bind those who are parties to it, but it has no binding force on other nations, nor does it make the delimited area of the sea the private property of any one. It merely constitutes a personal right between contracting parties. —*Ibid.*

Freedom of Travel and Trade

I shall base my argument on the following most specific and unimpeachable axiom of the Law of Nations, called a primary rule or first principle, the spirit of which is self-evident and immutable, to wit: Every nation is free to travel to every other nation, and to trade with it.—*Ibid.*, chap. i.

It is universally admitted that navigation on the sea is open to any one, even if permission is not obtained from any ruler.—*Ibid.*, chap. v.

By the law of nations the principle was introduced that the opportunity to engage in trade, of which no one can be deprived, should be free to all men. This principle, inasmuch as its application was continually necessary after the distinctions of private ownerships were made, can therefore be seen to have had a very remote origion. Aristotle, in a very clever phrase, in his work entitled *Politics* [I. ix (1275A)], has said that the art of exchange is a completion of the independence which Nature requires.—*Ibid.*, chap. viii.

It was permissible from the beginning of the world (when everything was in common) for any one to set forth and travel wheresoever he would. Now this was not taken away by the division of property, for it was never the intention of peoples to destroy by that division the reciprocity and common user which prevailed among men. . . .

"By natural law running water and the sea are common to all, so are rivers and harbors, and by the law of nations ships from all parts may be

moored there" (*Inst.*, II. i.); and on the same principle they are public things. Therefore it is not lawful to keep any one from them. . . .

The Spaniards may lawfully carry on trade among the native Indians, so long as they do no harm to their country, as, for instance, by importing thither wares which the natives lack and by exporting either gold or silver or other wares of which the natives have abundance. Neither may the native princes hinder their subjects from carrying on trade with the Spanish; nor, on the other hand, may the princes of Spain prevent commerce with the natives . . . because it is an apparent rule of the *ius gentium* that foreigners may carry on trade, provided they do no hurt to citizens.—Vitoria, *De Indis*, Sec. III, nos. 1–3.

It is certain that the aborigines can no more keep off the Spaniards from trade than Christians can keep off other Christians.—*Ibid.*, no. 3.

Vitoria [*De Indis*, Sec. II, nos. 1–7] holds that the Spaniards could have shown just reasons for making war upon the Aztecs and the Indians in America, more plausible reasons certainly than were alleged, if they really were prevented from traveling or sojourning among those peoples, and were denied the right to share in those things which by the Law of Nations or by Custom are common to all, and finally if they were debarred from trade. —Grotius, *Mare liberum*, chap. i.

Freedom of trade is based on a primitive right of nations which has a natural and permanent cause; and so that right cannot be destroyed, or at all events it may not be destroyed except by the consent of all nations. So far is that from being the case, that any one nation may justly oppose in any way, any other two nations that desire to enter into a mutual and exclusive contractual relation.—*Ibid.*, chap. viii.

Commerce is in accordance with the law of nations, and a law is not changed by opposition to it.—Gentili, *De jure belli*, Book I, chap. xix.

Commerce with infidels is not forbidden; the law of God does not bid us withdraw from the world, and the law of man commands commerce among all men.—*Ibid.*, Book III, chap. xix.

Commerce cannot be said to be prohibited, as soon as some one phase of it is forbidden, but only when all trade is prohibited.—*Ibid.*, Book I, chap. xix.

Discovery, Possession, and Occupation

Therefore, wild beasts, birds, and fishes, that is to say all creatures that exist on the earth, in the sea, or in the air, as soon as they are taken by any

one immediately become his property by the Law of Nations, since whatever formerly belonged to no one is conceded by natural reason to the first person obtaining possession of the same.—*Institutes* II. i. 12.

Right of discovery . . . seems to be an adequate title [for lawful possession] because those regions which are deserted become, by the law of nations and the natural law, the property of the first occupant.—Vitoria, *De Indis*, Sec. II, no. 7.

Discovery *per se* gives no legal rights over things unless before the alleged discovery they were *res nullius*.—Grotius, *Mare liberum*, chap. ii.

Natural reason itself, the precise words of the law, and the interpretation of the more learned men all show clearly that the act of discovery is sufficient to give a clear title of sovereignty only when it is accompanied by acutal possession.—*Ibid.*

The rule of the law of nations is that what belongs to nobody is granted to the first occupant.—Vitoria, *De Indis*, Sec. II, no. 7.

At the time of the Spaniards' first voyages to America they took with them no right to occupy the lands of the indigenous population.—*Ibid.*

Dominion

The Emperor is not the lord of the whole earth.—*Ibid.*, no. 1.

By natural law mankind is free save from paternal and marital dominion. . . . Therefore no one by natural law has dominion over the world.—*Ibid.*

The Pope is not civil or temporal lord of the whole world in the proper sense of the words "lordship" and "civil power."—*Ibid.*, no. 3.

[The claims] that unbelievers are not true owners of their possessions; or else that the Christian Emperor, or—at least—the Supreme Pontiff, has direct temporal dominion over the whole world . . . are vain inventions.—Suárez, *De bello*, sec. v, no. 4.

The Pope has temporal power only so far as it is in subservience to matters spiritual, that is, as far as is necessary for the administration of spiritual affairs.—Vitoria, *De Indis*, Sec. II, no. 5.

The Pope has no temporal power over the Indian aborigines or over other unbelievers.—*Ibid.*, no. 6.

Even if the barbarians refuse to recognize any lordship of the Pope, that furnishes no ground for making war on them and seizing their property. —*Ibid.*, no. 7.

Unbelieving princes may not simply and directly on the ground [of unbelief] be deprived by the Church of the power and jurisdiction which they hold over Christian subjects. This is the common opinion.—Suárez, *De mediis*, sec. v, no. 3.

Just as one private individual may not punish or coerce another private individual, and just as one Christian king may not be accorded such treatment by another Christian [king], nor an infidel ruler by another infidel [ruler], so neither may an infidel state, supreme in its own order, be punished by the Church on account of its crimes, even if those crimes are contrary to natural reason; and consequently, it may not be compelled to give up idolatry or similar rites.—*Ibid.*, sec. iv, no. 3.

Irrational creatures cannot have dominion.—Vitoria, *De Indis*, Sec. I, no. 20.

The Indian aborigines are not barred . . . from the exercise of true dominion.

This is proved from the fact that the true state of the case is that they are not of unsound mind, but have, according to their kind, the use of reason.—*Ibid.*, no. 23.

Civil laws may for a just cause change or transfer rights of dominion; and . . . when this change has been made, it may be said that the natural law is changed in an extrinsic sense, inasmuch as . . . the prior law lapses when the subject-matter has changed and another law becomes binding.—Suárez, *De legibus*, Book II, chap. xiv, § 19.

Mandates

That well-known pretext of forcing nations into a higher state of civilization against their will, the pretext once monopolized by the Greeks and by Alexander the Great, is considered by all theologians, especially those of Spain, to be unjust and unholy.—Grotius, *Mare liberum*, chap. ii.

It might, therefore, be maintained that in their [the Indians'] own interests the sovereigns of Spain might undertake the administration of their country, providing them with prefects and governors for their

towns, and might even give them new lords, so long as this was clearly for their benefit. I say there would be some force in this contention; for if they were all wanting in intelligence, there is no doubt that this would not only be a permissible, but also a highly proper, course to take; nay, our sovereigns would be bound to take it, just as if the natives were infants. . . . And surely this might be founded on the precept of charity, they being our neighbors and we being bound to look after their welfare. Let this, however, as I have already said, be put forward without dogmatism and subject also to the limitation that any such interposition be for the welfare and in the interests of the Indians and not merely for the profit of the Spaniards. For this is the respect in which all the danger to soul and salvation lies.—Vitoria, *De Indis,* Sec. III, no. 18.

[If] a given people . . . be so wretched as to live in general more like wild beasts than like men, as those persons are said to live who have no human polity, and who go about entirely naked, eat human flesh, etc. . . . they may be brought into subjection by war, not with the purpose of destroying them, but rather that they may be organized in human fashion, and justly governed. However, this ground [for war] should rarely or never be approved, except in circumstances in which the slaughter of innocent people, and similar wrongs take place.—Suárez, *De bello,* sec. v, no. 5.

The saying of Aristotle [that "some are . . . slaves by nature"—*Politics,* I. ii. 15] . . . would indeed be purely applicable, if there existed any people so barbarous that they were neither united in a civil society, nor capable of exercising government. For in that case, if would be not on the ground of religion, but on that of the defence of humanity, so to speak, that they might be forcibly subjected to the government of a state. But, in my opinion, no people so barbarous have yet been found.—Suárez, *De mediis,* sec. iv, no. 5.

Postliminium

The right of *postliminium* is that of recovering from a stranger property which has been lost, and of restoring it to its former condition; and this right has been established among us and other free peoples and kings, by custom and by law. For when we recover anything that we have lost by war or even outside of war, we are said to recover it by the right of *postliminium.*

This rule has been introduced by natural equity, so that anyone who has been detained unjustly by strangers will recover his former rights whenever he returns to his own country.—*Digest* XLIX. xv. 19.

Postliminium is the right either of recovering one's lost liberty, or of returning to one's former status after release from the chains of captivity; and within this right is necessarily comprehended a command to restore such and such a person to his former rights, or a prohibition against depriving him of such rights, after they have been recovered.—Suárez, *De legibus*, Book II, chap. xviii, § 5.

The right of *postliminium* exists in war, as well as in peace, with reference to such as have been taken captive during hostilities, and concerning whom no agreement was made.—*Digest* XLIX. xv. 12.

The right of *postliminium* exists both in war and in peace:

(1) In war, when those who are our enemies seize one of us, and take him within their fortifications, for if he returns during the same war, he will have the right of *postliminium;* that is to say, all his rights will be restored to him, just as if he had not been captured. Before he is taken into the fortifications of the enemy, he remains a citizen, and he is understood to have returned if he comes to our friends, or within our defences.

(2) The right of *postliminium* is also granted in time of peace; for if there is a nation between which and us there exists neither friendship, hospitality, nor any bond of attachment, it indeed is not our enemy. Anything, however, which belongs to us, and passes under its control becomes its property, and any freeman of our people taken in captivity by such a nation becomes its slave.

The same rule applies if anything belonging to the said nation comes into our hands, and therefore the right of *postliminium* is conceded in this instance.—*Ibid.*, 5, §§ 1, 2.

Enemies are those against whom the Roman people have publicly declared war, or who themselves have declared war against the Roman people; others are called robbers, or brigands. Therefore, anyone who is captured by robbers, does not become their slave, nor has he any need of the right of *postliminium*. He, however, who has been taken by the enemy, for instance, by the Germans or Parthians, becomes their slave, and recovers his former condition by the right of *postliminium.—Ibid.*, 24.

Property taken by pirates or brigands or those who are not "just" enemies is not affected in any way by the distinction whether or no the recaptured thing is of a kind which admits of postliminy or by the question whether or no it has been taken *intra praesidia;* for the things which such persons capture never pass into their ownership and accordingly, when they are retaken

they must be restored, without any distinction or condition, to their former owner, who has never lost ownership of them.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. v, § 38.

The right of *postliminium* applies to persons of both sexes, and all conditions. Nor does it make any difference whether they are freemen or slaves; for not only those are recovered by this privilege who are able to fight, but all human beings, because they are of such a character that they can be of use, either by giving advice, or in other ways.—*Digest* XLIX. xv. 19, § 10.

Those whose captivity was due to necessity are hereby notified that, if they did not go over to the enemy, but were carried away during a hostile attack, they should hasten to return to their own country, and that under the right of *postliminium* they will receive any property they formerly possessed in lands, slaves, or other effects, even though it may be in the possession of Our Treasury. Nor let any of them anticipate any delay resulting from a contest, as proof will only be required whether the party in question voluntarily accompanied the barbarians, or whether he was compelled to go.—*Code* VIII. li. 19.

Those who, having been conquered by force of arms, surrender to the enemy, are not entitled to the right of *postliminium.—Digest* XLIX. xv. 17.

Those who have given themselves up as conquered are deprived of . . . *postliminium.*—Gentili, *De jure belli,* Book II, chap. xvi.

It makes no difference in what way a captive returns, whether he has been sent back, or has escaped from the power of the enemy by force, or strategy; provided that he comes with the intention of not returning thither; for it is not sufficient for anyone merely to return bodily, when his intention is otherwise. Those, however, who are recovered from defeated enemies, are considered to have returned with the right of *postliminium.—Digest* XLIX. xv. 26.

After the captive returns under the right of *postliminium,* all legal questions, so far as he is concerned, are to be considered just as if he had never been in the hands of the enemy.—*Ibid.,* 12, § 6.

The right of *postliminium* is not enjoyed by a deserter, for he who abandons his country with evil intent, and with the designs of a traitor, is considered an enemy.—*Ibid.,* 19, § 4.

Captives who have returned from the enemy reacquire every right which they had forfeited by their captivity: and this is owing to the law of postliminy; but that is not the case if they have given their parole to return to the enemy or not to depart from him, for those who have returned to their own country in such circumstances can not be said to have returned by postliminy. . . .

A deserter also has no rights of postliminy. . . .

It must be remarked that postliminy may apply to all, whatever their sex, age, or rank, but, in order that it may apply in the case of soldiers, they must prove that they were captured fighting, there being no postliminy in the case of those who surrendered to the enemy after defeat and with arms in their hands.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. v, §§ 21, 22, 23.

Postliminium is denied to deserters.—Gentili, *De jure belli,* Book III, chap. xvii.

If a captive, for whom security has been given that he will return voluntarily, remains with the enemy, he will not afterwards be entitled to the right of *postliminium.—Digest* XLIX. xv. 20.

Ransom confers the power of returning to one's country, and does not change the right of *postliminium.—Ibid.,* 20, § 2.

A truce is established where it is agreed for a short time and for the present that adversaries shall not attack one another; and during this time the right of *postliminium* does not exist.—*Ibid.,* 19, § 1.

Anyone is considered to have returned with the right of *postliminium* when he passes our frontiers, just as he loses the right as soon as he goes beyond them.—*Ibid.,* 19, § 3.

If anything captured in war forms part of the booty, it does not return by the right of *postliminium.—Ibid.,* 28.

Land and the usufruct thereof are other things which revest by postliminy. —Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. v, § 33.

Large vessels and transports may revest by postliminy.—*Ibid.,* § 34.

Violations of the Law of Nations

To act contrary to the *jus gentium* and to violate it is illicit, because of itself it brings on an injury and a certain inequality.—Vitoria, *De jure gentium et naturali,*[17] no. 1.

[17] Trans. in J. B. Scott, *The Spanish Origin of International Law,* Part I, Appendix E, p. cxiii.

It is always illicit to violate the *jus gentium*, because it is contrary to the common consensus.—Vitoria, *De jure gentium et naturali*, no. 1.

It is not to be looked for that the law of nations should be respected by those who are contemning divine and human law.—Ayala, *De jure et officiis bellicis et disciplina militari*, Book I, chap. ix, § 6.

Peace and War

To the inexperienced war is pleasant, but he that hath had experience of it, in his heart sorely feareth its approach.—Pindar, "Dance Song," *Fragments*.

Surely to conquer one's enemies by generosity and equity is of far higher service than any victory in the field; for to arms the vanquished yield from necessity, to virtue from conviction.—Polybius, *The Histories*, V, chap. 12. 2–3.

For men must engage in business and go to war, but leisure and peace are better; they must do what is necessary and useful, but what is honorable is better.—Aristotle, *Politics*, VII. xiv. 14.

Between war and peace there is no middle term.—Cicero, *Philippics*, VIII. i. 4.

Beyond doubt it is a greater felicity to have a good neighbor at peace, than to conquer a bad one by making war.—St. Augustine, *De civitate Dei* IV. xv.

According to the true worshippers of God, even wars themselves partake of peace which are waged not by cupidity or cruelty, but by zeal for peace, so that the evil are punished, and the good are relieved.—Gratian, *Decretum*, Part II, cau. xxiii, qu. i, can. vi, citing Augustine, *De diversis ecclesiae observationibus*.[18]

In very deede it is an uncomelye matter and woorthie blame, that in warr (which of it selfe is nought) men shoulde showe themselves stout and wise, and in peace and rest (which is good) ignoraunt, and so blockishe that they wiste not howe to injoye a benefit. Even as therfore in warr they ought to bende their people to the profitable and necessarye vertues to come by

[18] Although no work of this title by St. Augustine is known, mention may be made of the fact that St. Ivo also ascribes it to him. St. Augustine's "Letter to Januarius" has an almost identical title and similar passages are to be found in *Decretum*, Part II, cau. xxiii, qu. i, can. iii, and Augustine, *De civitate Dei*, Book XIX, chap. xii.

that ende (which is, peace) so in peace, to come by the end thereof also (which is, quietnes) they ought to bend them to honest vertues, which be the end of the profitable. And in this wise shal the subjectes be good, and the Prince shall have manye mo to commende and to rewarde, then to chastise. And the rule both for the subjectes and for the Prince shall be most happye, not Lordly, as the maister over his bondeman, but softe and meeke, as a good father over his good childe.—Castiglione, *The Courtier* (Hoby trans., p. 319).

One must examine carefully into the affair and into one's own right, before hastily taking any step in violation of peace, if one wishes not merely to be excused, but even justified.—Gentili, *De jure belli,* Book III, chap. xxiv.

Definitions of Peace

The peace of the body then consists in the duly proportioned arrangement of its parts. The peace of the irrational soul is the harmonious repose of the appetites, and that of the rational soul the harmony of knowledge and action. The peace of body and soul is the well-ordered and harmonious life and health of the living creature. Peace between man and God is the well-ordered obedience of faith to eternal law. Peace between man and man is well-ordered concord. Domestic peace is the well-ordered concord between those of the family who rule and those who obey. Civil peace is a similar concord among the citizens. The peace of the celestial city is the perfectly ordered and harmonious enjoyment of God, and of one another in God. The peace of all things is the tranquillity of order. Order is the distribution which allots things equal and unequal, each to its own place.—St. Augustine, *De civitate Dei* XIX. xiii.

For peace is a good so great, that even in this earthly and mortal life there is no word we hear with such pleasure, nothing we desire with such zest, or find to be more thoroughly gratifying.—*Ibid.,* xi.

Peace should be the object of your desire.—*Ibid.,* Letter CLXXXIX. 6.

The name of peace is sweet, and the thing itself wholesome, but between peace and servitude the difference is great. Peace is tranquil liberty, servitude the last of all evils, one to be repelled, not only by war but even by death.—Cicero, *Philippics,* II. xliv. 113–14.

The word peace (*pax*) seems to be derived from *pactum* (an agreement). —Isidore, *Etymologies,* Book XVIII, chap. i, § 11.

Peace includes concord and adds something thereto.—St. Thomas Aquinas, II.–II, qu. 29, art. 1.

If one man concord with another, not of his own accord, but through being forced, as it were, by the fear of some evil that besets him, such concord is not really peace.—*Ibid.*

Peace is the *work of justice* indirectly, in so far as justice removes the obstacles to peace: but it is the work of charity directly, since charity, according to its very nature, causes peace.—*Ibid.*, art. 3, ad 3.

Peace is defined in a general way by Augustine as "ordered harmony"; and order is the proper distribution of things, which in the opinion of our own jurists and others is the nature of justice. We therefore define peace here as the orderly settlement of war.—Gentili, *De jure belli,* Book III, chap. i.

Definitions of War

Four things are observed in war: the fight, the flight, the victory, and the peace.—Isidore, *Etymologies,* Book XVIII, chap. i, § 11.

There are . . . four kinds of wars: that is, the just war, the unjust war, the civil war, and the more-than-civil war. A just war is one that is waged by command, [after] satisfaction has been demanded, or for the purpose of driving off the enemy. An unjust war is one begun by madness, not for a lawful reason. Cicero, in his *Republic* (III. xxiii, § 35) says of this sort of war: "Those wars are unjust which are undertaken without cause. For only a war waged for vengeance or defence can actually be just." And the same Tully, after a few remarks, adds, "No war is considered just unless it has been proclaimed and declared, or unless reparation has first been demanded." A civil war is a dissension which has arisen among the citizens, and a rebellion of the violent. . . . A more-than-civil war is one where not only the citizens contend, but also those [foreigners who are] connected by blood.—*Ibid.*, §§ 2–3.

War is a just and public contest of arms. . . .

The strife must be public; for war is not a broil, a fight, the hostility of individuals. . . .

. . . I maintain that the war must be just and that all the acts of the war must be just.—Gentili, *De jure belli,* Book I, chap. ii.

An external contest at arms which is incompatible with external peace is properly called war, when carried on between two sovereign princes or be-

tween two states. When, however, it is a contest between a prince and his own state, or between citizens and their state, it is termed sedition.—Suárez, *De bello,* Introduction.

War pertains to public justice, not to private revenge.—Bellarmine, *De laicis* xiv (Murphy trans., p. 64).

Effect of War on Law

When arms speak, the laws are silent.—Cicero, *Pro Milone* iv. 11.

Caesar said that arms and laws had not the same season.—Plutarch, *Lives,* "Caesar," xxxv. 3.

Laws passed in time of peace, war frequently annuls, and peace those passed in times of war.—Speech of Lucius Valerius, reported by Livy, XXXIV. vi. 6.

The use of force . . . is the absolute antithesis of law.—Cicero, *Pro Caecina* ii. 5.

Note the difference between peace-time and war-time, the reign of law and the reign of force, the civil procedure of the courts and the sword drawn in battle.—Cicero, *The Verrine Orations,* II. iv. 121.

In peace those steps may, without hindrance, be taken which equity and justice indicate and we may take our stand upon the law; but in times of war and tumult remedies of this ordinary kind are frequently found to be irritants, and stimulants of war and strife, rather than sedatives. Hence it is often the case that, with the exception of what has been enacted to hold good in perpetuity as being permanently expedient, war abrogates the legislation of peace and vice versa, just as in navigation (as Livy says) one set of measures is employed in good weather and another in bad weather.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book II, chap. v, § 1.

With soldiers the law of nations or natural justice is observed without the strictness of the civil code, according to the opinion of all the commentators. In fact, a soldier ought to know arms and not the law, and it is proper that military men should be ignorant of the law. It is a military custom to regard as ridiculous and silly the subtleties of the courts.—Gentili, *De jure belli,* Book II, chap. xv.

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War Condemned

It was always easy to begin a war, but very difficult to stop one.—Sallust, *The War with Jugurtha,* lxxxiii. 1.

We check manslaughter and isolated murders; but what of war and the much-vaunted crime of slaughtering whole peoples? . . . Deeds which would be punished by loss of life when committed in secret, are praised by us because uniformed generals have carried them out.—Seneca, *Letters,* xcv. 30.

To plunder, butcher, steal, these things they misname empire; they [the Romans] make a desolation and they call it peace.—Tacitus, *Agricola,* chap. 30.

If mortals should cherish everlasting hate and if mad rage, once felt, should never drop from our hearts, but if the victor should keep and the vanquished prepare arms, nothing will wars leave us; then on the wasted farms the fields will lie untilled, the torch will be set to homes, and deep ashes will overwhelm the buried nations. 'Tis expedient for the victor to wish for peace restored; for the vanquished 'tis necessity.—Seneca, *Hercules furens,* lines 361–69.

There lives no race that does not feel the goad of anger, which masters alike both Greeks and barbarians, and is no less ruinous to those who respect the law than to those who make might the only measure of their right. Lastly, though the other vices lay hold of individual men, this is the only passion that can at times possess a whole state. No entire people has ever burned with love for a woman, no whole state has set its hope upon money or gain; ambition is personal and seizes upon the individual; only fury is an affliction of a whole people. Often in a single mass they rush into anger; men and women, old men and boys, the gentry and the rabble, are all in full accord, and the united body, inflamed by a very few incendiary words, outdoes the incendiary himself; they fly forthwith to fire and sword, and proclaim war against their neighbors or wage it against their countrymen; whole houses are consumed, root and branch, and the man who but lately was held in high esteem and applauded for his eloquence receives now the anger of his following; legions hurl their javelins upon their own commanders; all the commoners are at discord with the nobles; the senate, the high council of the state, without waiting to levy troops, without appointing a commander, chooses impromptu agents of its wrath, and hunting down its highborn victims throughout the houses of the city, takes punishment in

its own hand; embassies are outraged, the law of nations is broken, and unheard of madness sweeps the state, and no time is given for the public ferment to subside, but fleets are launched forthwith and loaded with hastily gathered troops; without training, without auspices, under the leadership of its own anger, the populace goes forth, snatching up for arms whatever chance has offered, and then atones for the rash daring of its anger by a great disaster.—Seneca, *De ira* III. ii. 1–5.

Most people think that the achievements of war are more important than those of peace; but this opinion needs to be corrected.—Cicero, *De officiis* I. xxii. 74.

It is not wisdom that contrives arms, or walls, or instruments useful in war; nay, her voice is for peace, and she summons all mankind to concord. —Seneca, *Letters,* xc. 26–27.

To make war on your neighbors, and thence to proceed to others, and through mere lust of dominion to crush and subdue people who do you no harm, what else is this to be called than great robbery?—St. Augustine, *De civitate Dei* IV. vi.

It is to be observed that little or no profit comes from war. When any one wages war to recover his own [property], he expends more in carrying on the struggle than he gains. Even when he wages war in order to avenge the death of one dear to him, that is of no advantage to the dead person.— St. Thomas Aquinas, *De eruditione principum,* Book VII, chap. viii.

Wise men very frequently avoid war. Thus Solomon, who was exceedingly wise, kept his kingdom in complete peace for nearly forty years. Even though peace is so great a benefit that it is sought through its contrary [i.e., war], nevertheless since peace and war are opposed one to the other, and are in the highest degree incompatible, it is a long road that leads to peace by way of war; therefore another road should be taken. Man will attain to peace more speedily by exercising patience than by waging war, by granting concessions rather than by making seizures. This being the case, princes ought to be admonished to fear war and to guard against its various consequences.—*Ibid.*

It is especially barbarous for Christian to wage war with Christian.—*Ibid.*

No one can be a true statesman, whether he aims at the happiness of the individual or state, who looks only, or first of all, to external warfare; nor

will he ever be a sound legislator who orders peace for the sake of war, and not war for the sake of peace.—Plato, *Laws,* I, p. 628.

Let us sum up all acts of violence under a single law, which shall be as follows: No one shall take or carry away any of his neighbor's goods, neither shall he use anything which is his neighbor's without the consent of the owner; for these are the offences which are and have been, and will ever be, the source of all the aforesaid evils.—*Ibid.,* X, p. 884.

Military states are safe only while they are at war, but fall when they have acquired their empire; like unused iron they rust in time of peace. And for this the legislator is to blame, he never having taught them how to lead the life of peace.—Aristotle, *Politics,* VII. xiv. 22.

Now it is the common soldiers who are slain. The leaders, the rich, are saved, that they may ransom themselves. O unjust form of waging war and cruel traffic! . . . Our worthy leaders consult for their own interests in this new fashion; for if they should come into the hands of the enemy, they would no longer have to fear for their own lives, now that the lavish shedding of the blood of the common soldiers has become customary.—Gentili, *De jure belli,* Book III, chap. viii.

Self-Defense[19]

Is it not monstrous, is it not manifestly contrary to law,—I do not mean merely to the statute law but to the unwritten law of our common humanity,—that I should not be permitted to defend myself against one who violently seizes my goods as though I were an enemy?—Demosthenes, *Against Aristocrates,* § 61.

When anyone kills another who attacks him with a sword, he should not be considered a homicide, for the reason that the defender of his own life is not held to have committed an offence.—*Code* IX. xvi. 3.

There does exist therefore, gentlemen, a law which is a law not of the statute-book, but of nature; a law which we possess not by instruction, tradition, or reading, but which we have caught, imbibed, and sucked in at Nature's own breast; a law which comes to us not by education but by constitution, not by training but by intuition—the law, I mean, that, should our life have fallen into any snare, into the violence and the weapons of robbers or foes, every method of winning a way to safety would be morally justifiable. When arms speak, the laws are silent.—Cicero, *Pro Milone,* § 10.

[19] On defensive warfare, see various passages under the rubric "Just Causes of War," *infra,* p. 303.

But if a truth instilled into civilized beings by reason, into barbarians by necessity, into mankind by custom, and even into brute beasts by Nature herself, that always and in all circumstances they should repel violence, by whatever means were in their power, from their persons, their heads, and their lives,—then you cannot judge this to have been a wicked act without at the same time judging that all who have fallen upon robbers deserve to perish, if not by *their* weapons, then by *your* votes.—*Ibid.*, § 30.

All laws allow the repelling of force with force (*Decretals*, V. xxxix. 3). The reason . . . is that the right of self-defence is natural and necessary.—Suárez, *De bello*, sec. i, no. 4.

All laws and all codes allow the repelling of force by force. There is one rule which endures for ever, to maintain one's safety by any and every means.—Gentili, *De jure belli*, Book I, chap. xiii.

The right of defence is in accordance with the law of nature and of God, has the consent of all nations, is born with the world, and is destined to endure so long as the world lasts; and this no civil nor canon law can annul.—*Ibid.*, Book III, chap. vi.

Any one, even a private person, can accept and wage a defensive war. This is shown by the fact that force may be repelled by force. . . . Hence any one can make this kind of war, without authority from any one else, for the defense not only of his person, but also of his property and goods.—Vitoria, *De iure belli*, no. 3.

Defensive war not only is permitted, but sometimes is even commanded. —Suárez, *De bello*, sec. i, no. 4.

Private War Condemned

There is a distinction between private persons and states; for, granting that a private person may defend himself and his property, it is nevertheless impermissible for him to avenge himself or to reclaim his own property save through the judge.—Vitoria, *De bello*, art. I, § 3.[20]

The difference herein [i.e., as regards war] between a private person and a State is that a private person is entitled, as said above, to defend himself and what belongs to him, but has no right to avenge a wrong done to him, nay, not even to recapt property that has been seized from him if time has

[20] Trans. in J. B. Scott, *The Spanish Origin of International Law*, Part I, Appendix F, p. cxvi.

been allowed to go by since the seizure. But defense can only be resorted to at the very moment of the danger, or as the jurists say, *in continenti*, and so when the necessity of defense has passed there is an end to the lawfulness of war.—Vitoria, *De iure belli*, no. 5.

Private individuals, subject peoples, and petty sovereigns are never confronted with the necessity of resorting to the arbitrament of Mars, since they can obtain their legal rights before their superiors' tribunal.—Gentili, *De jure belli*, Book I, chap. iii.

Although a private person, when he cannot obtain his rights at the hands of a public tribunal, may secretly and without scandal protect himself, nevertheless he may not do so by force, and through war; and still less may he avenge himself [after an injury has actually been inflicted], if he is not able to obtain such vengeance through the judge. For a punishment inflicted by one's own private authority is intrinsically evil, and tumults and wars might easily be provoked within a state, on this pretext. . . . Therefore, license [to exact private vengeance] must not be granted to a portion of a state or to a private person, save only within the limits of a just defense. . . . More things are allowable to a given state or commonwealth with regard to its own defense than to a given private individual; because the good defended in the former case is common to many, and is of a higher grade, and also because the power of a state is by its very nature public and common; therefore, it is not strange that more things are permissible to a state than to an individual.—Suárez, *De bello*, sec. ii, nos. 2–3.

Right to Wage War

The natural order which seeks the peace of mankind, ordains that the monarch should have the power of undertaking war if he thinks it advisable, and that the soldiers should perform their military duties in behalf of the peace and safety of the community.—St. Augustine, *Contra Faustum* XXII. lxxv.

There is as much difference between the authority for undertaking public war and that for undertaking private war[21] as there is between the state and the private individual as regards the right of defense and vengeance. For that right does not pertain to the individual, except that he may "repel force with force [. . .] as a means of self-defense when he is without blame." [*Decretals*, V, tit. xii, chap. xviii.] It is, however, beyond the limits of such

[21] On private war, see the immediately preceding rubric.

blameless self-defense that a private person should avenge himself or others. . . . A state, on the other hand, is charged with the care of its members and of itself in such a way that not only can it repel force with force, within due bounds, but can even avenge injuries to itself or its members, whether these are committed by its subjects or by foreigners. As regards its subjects this is certainly clear, since punitive justice pertains to the state. With reference to foreigners it is proved by the fact that the state should be self-sufficient, as is clear from *Politics,* III. i. 8 and v. 14. It is certain, moreover, that unless the state can avenge itself with respect to foreign peoples and states, it is extremely imperfect and deficient. For [under those circumstances] the robberies, murders, seizures and other injuries of whatever nature committed by tyrants and unjust persons against the citizens of foreign states, would in the nature of things go unpunished, and the natural order would be found wanting in matters of necessity.—Cajetan, *On St. Thomas Aquinas,* II.–II, qu. 40, art. 1.

The war must be [declared by] a public personage; the waging of war pertains to princes (*principes*).—Vitoria, *De bello,* Art. I, § 3.[22]

Every State has authority to declare and to make war. . . . A State is within its rights not only in defending itself, but also in avenging itself and its subjects and in redressing wrongs. . . . A prince has the same authority in this respect as the State has.—Vitoria, *De iure belli,* nos. 5–6.

Now in order that a war may be styled just, it ought in the first place to be declared and undertaken under the authority and warrant of a sovereign prince, in whose hands is the arbitrament of peace and war. For a private person has no business to begin a war, seeing that he can, and ought to, assert his right in the courts.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. ii, § 7.

A sovereign prince who has no superior in temporal affairs, or a state which has retained for itself a like jurisdiction, has by natural law legitimate power to declare war.—Suárez, *De bello,* sec. ii, no. 1.

An inferior prince, or an imperfect state, or whosoever in temporal affairs is under a superior, cannot justly declare war without the authorization of that superior.—*Ibid.,* no. 2.

Petty rulers and princes, who are not at the head of a perfect State, but are parts of another State, can not begin to carry on a war. . . . As, however,

[22] Trans. in J. B. Scott, *The Spanish Origin of International Law,* Part I, Appendix F, p. cxvi.

these matters are for a great part governed by the law of nations or by human law, custom can give power and authority to make war. And so if any State or prince has obtained by ancient custom the right to make war of itself or himself, this authority can not be gainsaid, even if in other respects the State be not a perfect one. So, also, necessity can confer this license and authority.—Vitoria, *De iure belli,* no. 9.

There is no ground for war so exclusively reserved to Christian princes that it has not some basis in, or at least some due relation to, natural law, being therefore also applicable to princes who are unbelievers.—Suárez, *De bello,* sec. v, no. 6.

This authority for declaring war resides, according to common opinion, in all rulers, and in nations, who in temporal affairs have no superior, such as are all kings, likewise the Republic of Venice and similar States, and likewise some Dukes and Counts who are subject to no one in secular matters; not, however, those Dukes and Counts who are immediately subject to kings, for those who are subject to others are not in themselves heads of the State, but rather members. Note, nevertheless, that this authority is not requisite for defensive war, but only for offensive; for it is lawful for everyone to defend himself, whether he be a ruler or a private citizen, but to declare war, or to invade the territory of an enemy, is lawful only for the supreme head.—Bellarmine, *De laicis* xv (Murphy trans., p. 71).

Sedition and Rebellion

For internal strife is a thing as much worse than war carried on by a united people, as war itself is worse than peace.—*The History of Herodotus,* Book VIII, chap. 3.

Just as that is called a war which is waged against enemies, so that is called a rebellion which is stirred up by civil dissension. For a dissension is a disagreement among the citizens; it is so called particularly because some rise up against the others. Some consider that [such a] disagreement is called a dissension of minds, which the Greeks call διάστασις. But Cicero shows how they differ (*Philippics,* viii. 3): "For," says he, "there can be a war that is not a rebellion. But there can be no rebellion without war. For what is any rebellion except so great a disturbance that a greater fear arises?" From this, indeed, it is called a rebellion (*tumultus*), being, as it were, "much fear" (*timor multus*).—Isidore, *Etymologies,* Book XVIII, chap. i, §§ 6–7.

Sedition, in its proper sense, is between the mutually dissentient parts of one people, as when one part of the state rises in tumult against another part. —St. Thomas Aquinas, II.–II, qu. 42, art. 1.

Sedition is contrary to the unity of the multitude, viz. the people of a city or kingdom. Now Augustine says[23] (*De civ. Dei* II. xxi) that "wise men understand the word people to designate not any crowd of persons but the assembly of those who are united together in fellowship recognized by law and for the common good." Wherefore it is evident that the unity to which sedition is opposed is the unity of law and common good: whence it follows manifestly that sedition is opposed to justice and the common good. Therefore by reason of its genus it [sedition] is a mortal sin, and its gravity will be all the greater according as the common good which it assails surpasses the private good which is assailed by strife.—*Ibid.*, art. 2.

A tyrannical government is not just, because it is directed, not to the common good, but to the private good of the ruler, as the Philosopher states (*Polit.* iii. 5; *Ethic.* viii. 10). Consequently there is no sedition in disturbing a government of this kind, unless indeed the tyrant's rule be disturbed so inordinately, that his subjects suffer greater harm from the consequent disturbance than from the tyrant's government. Indeed it is the tyrant rather that is guilty of sedition, since he encourages discord and sedition among his subjects, that he may lord over them more securely; for this is tyranny, being conducive to the private good of the ruler, and to the injury of the multitude.—*Ibid.*, ad 3.

Sedition is the term used to designate general warfare carried on within a single state, and waged either between two parts thereof or between the prince and the state.—Suárez, *De bello*, sec. viii, no. 1.

Sedition involving two factions of the state is always an evil on the part of the aggressor, but just on the defensive side.—*Ibid.*

Rebels are those who although subjects, oppose the command or act of their superior; or at any rate those who resist a sovereign or an official of his in matters affecting the condition of the empire.—Gentili, *De jure belli*, Book I, chap. vii.

Now rebels ought not to be classed as enemies, the two being quite distinct, and so it is more correct to term the armed contention with rebel

[23] In the section of the *De civitate Dei* here referred to, St. Augustine summarizes Cicero's *De re publica*, Book III.

subjects execution of legal process, or prosecution, and not war.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. ii, § 14.

In dealing with rebels . . . every one not only may, but must, foil their attempts without waiting for the prince's command, should delay be perilous.—*Ibid.,* § 10.

It is also evident that the war of a prince against a state subject to himself, may be just, from the standpoint of rightful authority, if all the other required conditions be present, but that, in the absence of those conditions, that same war is entirely unjust.—Suárez, *De bello,* sec. viii, no. 3.

Whether Christians May Engage in War

What aspect of war do we condemn? Is it the death of persons who are in any case destined to die at one time or another, but who give up their lives to bring peace by overcoming guilty men? Such a reproach bespeaks not piety, but timidity. The desire to inflict injury, the harshness that seeks revenge, the unappeased and unappeasable mind, the ferocity of rebellion, the lust for dominion, and whatsoever is of a similar nature—these are the things rightfully condemned in wars. For the most part, it is in order that such things may be punished, and rightfully punished, too, that good men resort to war itself (war of the kind waged against the violence of those who offer resistance, whether to God, or to the commands of some legitimate power), when such men find themselves in that situation of human affairs wherein [God] Himself justly constrains them either to issue orders for these warlike undertakings, or to engage therein by way of obedience. Wherefore, John does not enjoin the soldiers to lay down their arms; and Christ bids that tribute be rendered unto Caesar, since pay must be provided for soldiers, because of wars. Moreover, that natural order which is accommodated to peace among mortals requires that princes shall be invested with the authority to make war and to take counsel therefor. On the other hand, if a war is waged because of human cupidity, that war is not injurious to the holy, over whom no man has power unless it be given from above. For there is no power save from God; from His commands, or His prohibitions. Therefore, a just man, even if he chances to be serving under a king who is sacrilegious, may righteously wage war by that king's command if— [the natural] order adapted to peace being thereby observed—it is either certain that the command given him is not contrary to the command of God, or at least uncertain whether or not such is the case; so that the iniquity involved in the issuance of the com-

mand may perchance render the king guilty, but the duty of obedience will bespeak the soldier's innocence.—Gratian, *Decretum*, Part II, cau. xxiii, qu. i, can. iv, citing Augustine, *Contra Faustum* XXII. lxxiv and lxxv.

As Augustine says (*Contra Faust.* xxii. 70): To *take the sword* is to arm oneself in order to take the life of anyone, without the command or permission of superior or lawful authority. On the other hand, to have recourse to the sword (as a private person) by the authority of the sovereign or judge, or (as a public person) through zeal for justice, and by the authority, so to speak, of God, is not to *take the sword*, but to use it as commissioned by another, wherefore it does not deserve punishment.—St. Thomas Aquinas, II.–II, qu. 40, art. 1, ad 1.

A soldier, when he kills a man (being obedient to the power under which he was legally appointed) is guilty of homicide under no law of his city; nay rather, unless he does kill him, he is guilty of having deserted and belittled the power. But if he should do it by his own will and authority, the crime of shedding human blood would be committed. And therefore [you see] for what reason he is punished if he did it without orders, and for what reason he will be punished if, under orders, he did not do it.—*Decretum*, Part II, cau. xxiii, qu. v, can. xiii, citing Augustine, *De civitate Dei*, Book I, chap. xxvi.

To serve as a soldier is no crime, but to serve as a soldier for the sake of the booty is a sin.—*Ibid.*, qu. i, can. v, citing Augustine, *On the Words of the Lord*, or Sermon LXXXII in Appendix, no. 1, Maur. ed.

Christians may serve in war and make war. This is the conclusion of St. Augustine in the many passages where he thoroughly considers the question, such as: (*a*) in his *Contra Faustum*, (*b*) in his *Liber 83 Quaestionum*, (*c*) in his *De verbis Domini*, in his *Contra Secundinum Manichaeum*, (*d*) in his sermon on the Centurion's son, and (*e*) in his Letter to Boniface. And, as St. Augustine shows, this is proved by the words of John the Baptist to the soldiers [Luke 3], "Do violence to no man, neither accuse any falsely." "But," says St. Augustine, (*f*) "if Christian doctrine condemned war altogether, those looking for counsels of salvation in the Gospel would be told to throw away their arms and give up soldiering altogether; but what is said to them is, 'Do violence to no man and be content with your wages.'"[24] —Vitoria, *De iure belli*, no. 1.

[24] Vitoria is here quoting from the *Epistle to Marcellinus* (138), II. 15.

To take part in a just war is no wrong, as we have elsewhere shown; but to do so for the sake of booty is a sin. And so, when John, a man most acceptable to God, was asked by the soldiers, who were anxious about salvation, what they should do, he did not forbid them to serve as soldiers, but said, "Do violence to no man, neither accuse any falsely, and be content with your wages."—Ayala, *De jure et officiis bellicis et disciplina militari*, Book III, chap. iv, § 1.

War, absolutely speaking, is not intrinsically evil, nor is it forbidden to Christians.—Suárez, *De bello*, sec. i, no. 2.

War as a Force Suit

A prince when at war has by right of war the same authority over the enemy as if he were their lawful judge and prince.—Vitoria, *De iure belli*, no. 46.

A prince who has on hand a just war is *ipso jure* the judge of his enemies and can inflict a legal punishment on them, condemning them according to the scale of their wrongdoing.—Vitoria, *De Indis*, Sec. III, no. 8.

If there were any competent judge over the two belligerents, he would have to condemn the unjust aggressors and authors of wrong, not only to make restitution of what they have carried off, but also to make good the expenses of the war to the other side, and also all damages. But a prince who is carrying on a just war is as it were his own judge in matters touching the war, as we shall forthwith show. Therefore he can enforce all these claims upon his enemy.—*Ibid.*, no. 17.

After victory has been won and redress obtained and peace and safety been secured, it is lawful to avenge the wrong received from the enemy and to take measures against him and exact punishment from him for the wrongs he has done. In proof of this be it observed that princes have authority not only over their own subjects, but also over foreigners, so far as to prevent them from committing wrongs, and this is by the law of nations and by the authority of the whole world. Nay, it seems to be by natural law also, seeing that otherwise society could not hold together unless there was somewhere a power and authority to deter wrongdoers and prevent them from injuring the good and innocent. Now, everything needed for the government and preservation of society exists by natural law, and in no other way can we show that a State has by natural law authority to in-

flict pains and penalties on its citizens who are dangerous to it. But if a State can do this to its own citizens, society at large no doubt can do it to all wicked and dangerous folk, and this can only be through the instrumentality of princes. It is, therefore, certain that princes can punish enemies who have done a wrong to their State and that after a war has been duly and justly undertaken the enemy are just as much within the jurisdiction of the prince who undertakes it as if he were their proper judge.—Vitoria, *De iure belli,* no. 19.

Just as within a state some lawful power to punish crimes is necessary to the preservation of domestic peace; so in the world as a whole, there must exist, in order that the various states may dwell in concord, some power for the punishment of injuries inflicted by one state upon another; and this power is not to be found in any superior, for we assume that these states have no commonly acknowledged superior; therefore, the power must reside in the sovereign prince of the injured state, to whom, by reason of that injury, the opposing prince is made subject; and consequently, war of the kind in question has been instituted in place of a tribunal administering just punishment.—Suárez, *De bello,* sec. iv, no. 5.

Private citizens, and those who have a superior, if they are injured by any one, can have recourse to the superior, and seek judgment from him. But if rulers suffer anything at the hands of another ruler, they have no common tribunal before which they may accuse the aggressor, and therefore it is lawful for them to oppose public wrongs by war.—Bellarmine, *De laicis* xv (Murphy trans., p. 71).

A ruler is the judge of his own subjects only, therefore he cannot punish any crimes committed by the subjects of others, but only those which happen to the harm of his own subjects; for even if he is not the ordinary judge of others, yet he is the defender of his own people, and by reason of this obligation it comes to pass that he is also to a certain extent the judge of those who do harm to his people, so that he can punish them with death.—Bellarmine, *De laicis* xv (Murphy trans., p. 72).

A ruler having just cause for wars bears the character of judge with regard to the other ruler who has done him an injury, but a judge is not bound in justice to pardon a criminal from the death penalty, even if he offers satisfaction, although, if he is the supreme judge, he can pardon him out of mercy. . . [But] war is a most severe infliction, by which not only he who has offended is punished, but incidentally many innocent persons are

also involved. Therefore, Christian charity seems always to exact this, that the war should end when he who has done the injury offers the satisfaction due.—Bellarmine, *De laicis* xv (Murphy trans., p. 74).

The power of declaring war is (so to speak) a power of jurisdiction, the exercise of which pertains to punitive justice, which is especially necessary to a state for the purpose of constraining wrongdoers; wherefore, just as the sovereign prince may punish his own subjects when they offend others, so he may avenge himself on another prince or state which by reason of some offense becomes subject to him; and this vengeance cannot be sought at the hands of another judge, because the prince of whom we are speaking has no superior in temporal affairs; therefore, if that offender is not prepared to give satisfaction, he may be compelled by war to do so.—Suárez, *De bello*, sec. ii, no. 1.

The judge is merely a distributor of property over which he personally has no right; consequently, if the rights of the parties in question are at all times entirely equal, there is no reason which would allow him to allot the whole property to either party; and therefore, the judge is bound to divide the property. Or, if this cannot be advantageously done, it will be necessary to satisfy both sides, in some fashion. Hence, in a question involving war, the Princes shall be bound to this same attitude.—*Ibid.*, sec. vi, no. 4.

When there exist a tribunal and an authority superior to both parties, it is contrary to the law of nature to strive for one's own right by force, and acting (as it were) on one's own authority.—*Ibid.*, sec. ii, no. 2.

It is necessary to preserve in war the same quality as in a just judgment; and in such a judgment, the offender cannot be visited with every sort of punishment nor deprived of all his property without any restriction, but may be punished only in proportion to his fault.—*Ibid.*, sec. vii, no. 7.

The war on both sides must be public and official and there must be sovereigns on both sides to direct the war. This is the view both of Augustine and of the other theologians, and reason shows that war has its origin in necessity; and this necessity arises because there cannot be judicial processes between supreme sovereigns or free peoples unless they themselves consent, since they acknowledge no judge or superior. . . . The sovereign has no earthly judge, for one over whom another holds a superior position is not a sovereign.—Gentili, *De jure belli*, Book I, chap. iii.

It is the victor who has the power to decide which is the just cause, and also his own reason for entering the contest. Accordingly, he can hardly pronounce the cause of the vanquished just, without pronouncing his own victorious cause unjust; and therefore he will not do it. Moreover, although a war may be undertaken justly by both sides, it cannot, however, appear so to both parties. Yet since the victor in this case assumes the character of a just judge and is not merely a partisan, he ought, so far as is possible, to have regard to the principles of justice and along with his own rights to maintain those of the other party. In the judgment, too, which he passes as to the punishment to be inflicted upon the vanquished, he ought to show the moderation appropriate to his twofold character.—*Ibid.*, Book III, chap. iii.

The victor may, without violating the laws of nature, do anything which tends to make his victory firm and ensure a peace which is just to himself and to the vanquished. Everything is in the hands of the victor, save for such exceptions as are suggested by the law of nations. As regards sureties, everything is in the hands of the judge, who in this case is the victor, and who according to the character of the persons, the danger, and the places, has to decide what safeguards are effective and what are not.—*Ibid.*, Book III, chap. xiii.

Steps Which Should Precede War

Since there are two ways of settling a dispute: first, by discussion; second, by physical force; and since the former is characteristic of man, the latter of the brute, we must resort to force only in case we may not avail ourselves of discussion. The only excuse, therefore, for going to war is that we may live in peace unharmed; and when the victory is won, we should spare those who have not been blood-thirsty and barbarous in their warfare.—Cicero, *De officiis* I. xi. 34–35.

Always in quarrels threatening to become matters of war, every effort should be made to settle the dispute through conference, and only as a last resort through battle.—Dante, *De monarchia* II. x. 1.

Before a war is begun the [attacking] prince is bound to call to the attention of the opposing state the existence of the just cause of war, and to seek adequate reparation therefor; and if the other state offers such adequate reparation, he is bound to accept it, and desist from war; for if he does not do so, the war will be unjust. If, on the other hand, the opposing prince refuses to give satisfaction, the first prince may begin to make war. . . . Any

other manner of making war would be unjust, and therefore the cause of war itself would become unjust. For where a full and sufficient satisfaction is voluntarily offered, there is no ground for violence; especially not, since reason demands that punitive justice be exercised with the least possible harm to all, provided, however, that the principle of equality be observed. Moreover, one sovereign has no coercive power over another sovereign, unless the latter acts unjustly, as is the case when he is unwilling to give satisfaction.—Suárez, *De bello,* sec. vii, no. 3.

Since war is a sort of means to peace, but very hard and dangerous, therefore war should not be begun in haste, when there is cause, but peace should first be sought by some easier means, namely, by peacefully seeking the reparation due from the enemy.—Bellarmine, *De laicis* xv (Murphy trans., p. 73).

Reason in arriving at determinations is . . . more to be sought after than bravery in fighting, and it is becoming in a wise man to try every other course before resorting to arms.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book II, chap. i, § 3.

War ought not to be made on the sole judgment of the king, nor, indeed, on the judgment of a few, but on that of many, and they wise and upright men.—Vitoria, *De iure belli,* no. 24.

Princes are judges in their own cases, inasmuch as they have no superior. But it is certain that, if any one raises any objection to a lawful possessor, the judge is bound to examine the case. Therefore in a doubtful matter princes are bound to examine their own case.—*Ibid.,* no. 29.

The magnates who are admitted to the council of the prince, are obliged to inquire into the cause of the war, for this is the proper course of action for them. And besides, it is their duty to admonish the king as to whether or not the war ought to be waged; for they should aid him with their counsel.—Vitoria, *De bello,* art. I, § 8.[25]

The sovereign ruler is bound to make a diligent examination of the cause [of war] and its justice, and . . . after making this examination, he ought to act in accordance with the knowledge thus obtained. . . . If, finally, after diligent investigation, the probabilities [of justice] on both sides are found to be equal, or if, at least, equal uncertainty exists—whatever the ground

[25] Trans. in J. B. Scott, *The Spanish Origin of International Law,* Part I, Appendix F, p. cxix.

of the uncertainty—then, if the opposing party is in possession, he ought to have the preference, because even in a judicial process, that party is favored, inasmuch as he has the greater right.—Suárez, *De bello*, sec. vi, nos. 1, 3.

I conclude that, unless it is necessary, war cannot be just, since a just war is said to be declared as the result of necessity. First there must be an appeal to a voluntary compromise and to natural reason, that arbitress of good and evil, as Seneca calls her; also to other considerations, which have previously been noted. Otherwise, he who tries to avoid a legal process distrusts the justice of his cause.—Gentili, *De jure belli*, Book I, chap. iii.

If war is no more secret a strife than are the legal contests of the Forum and the courts, . . . denunciation ought to be made beforehand; as is done in a peaceful suit at law. Before we enter upon legal proceedings we ask in civil fashion for what is due us or what is our own.—*Ibid.*, Book II, chap. i.

Just War

In order for a war to be just, three things are necessary. First, the authority of the sovereign by whose command the war is to be waged. For it is not the business of a private individual to declare war, because he can seek for redress of his rights from the tribunal of his superior. Moreover it is not the business of a private individual to summon together the people, which has to be done in wartime. And as the care of the common weal is committed to those who are in authority, it is their business to watch over the common weal of the city, kingdom or province subject to them. And just as it is lawful for them to have recourse to the sword in defending that common weal against internal disturbances, when they punish evil-doers, according to the words of the Apostle (Rom. xiii. 4): "He beareth not the sword in vain: for he is God's minister, an avenger to execute wrath upon him that doth evil"; so too, it is their business to have recourse to the sword of war in defending the common weal against external enemies. Hence it is said to those who are in authority (Ps. lxxxi. 4—Douay version): "Rescue the poor: and deliver the needy out of the hand of the sinner"; and for this reason Augustine says (*Contra Faust.* xxii. 75): "The natural order conducive to peace among mortals demands that the power to declare and counsel war should be in the hands of those who hold the supreme authority."

Secondly, a just cause is required,[26] namely that those who are attacked, should be attacked because they deserve it on account of some fault. Where-

[26] See also the next rubric, "Just Causes of War."

fore Augustine says (*QQ. in Hept.*, qu. x., *super Jos.*): "A just war is wont to be described as one that avenges wrongs, when a nation or state has to be punished, for refusing to make amends for the wrongs inflicted by its subjects, or to restore what it has seized unjustly."

Thirdly, it is necessary that the belligerents should have a rightful intention, so that they intend the advancement of good, or the avoidance of evil. Hence Augustine says (*De verb. Dom.*): "True religion looks upon as peaceful those wars that are waged not for motives of aggrandisement, or cruelty, but with the object of securing peace, of punishing evil-doers, and of uplifting the good."[27]—St. Thomas Aquinas, II.–II, qu. 40, art. 1.

That kind of war is undoubtedly just which God Himself ordains.—St. Augustine, *Questions on Heptateuch,* Book VI, qu. x.

That war is just which is necessary, and righteous are their arms to whom, save only in arms, no hope is left.—Livy, IX. i. 10.

The continuance as well as the beginning of the war ought to be dictated by necessity.—Suárez, *De bello,* sec. vii, no. 4.

In order that the State may be preserved, it is necessary that all enemies, internal as well as external, may be kept off. And since this is the law of nature it is incredible that it should be set aside by the Gospel.—Bellarmine, *De laicis* xiv (Murphy trans., p. 62).

War is permissible [only] that a state may guard itself from molestation; for in other respects, war is opposed to the welfare of the human race on account of the slaughter, material losses and other misfortunes which it involves.—Suárez, *De bello,* sec. iv, no. 1.

Even when war is aggressive, it is not an evil in itself, but may be right and necessary. . . . The reason . . . is that such a war is often necessary to a state, in order to ward off acts of injustice and to hold enemies in check. Nor would it be possible, without these wars, for states to be maintained in peace. Hence, this kind of warfare is allowed by natural law; and even by the law of the Gospel, which derogates in no way from natural law.—*Ibid.*, sec. i, no. 5.

While a war is not in itself evil, nevertheless, on account of the many misfortunes which it brings in its train, it is one of those undertakings that

[27] This statement is erroneously attributed to St. Augustine. Its authorship is apparently uncertain, but it is to be found in *Decretum,* Part II, causa xxiii, qu. i, can. vi.

are often carried on in evil fashion; and . . . therefore, it requires many [justifying] circumstances to make it righteous.—*Ibid.*, sec. i, no. 7.

In order that a war may be justly waged, a number of conditions must be observed, which may be grouped under three heads. First, the war must be waged by a legitimate power; secondly the cause itself and the reason must be just[28]; thirdly, the method of its conduct must be proper, and due proportion must be observed at its beginning, during its prosecution and after victory.—*Ibid.*, sec. i, no. 7.

When the justice of war is doubtful, . . . it seems that if one [prince] be in lawful possession, the other may not try to turn him out by war and armed force, so long as the doubt remains.—Vitoria, *De iure belli,* no. 27.

Whether a war can be just on both sides. . . . Apart from ignorance the case clearly can not occur, for if the right and justice of each side be certain, it is unlawful to fight against it, either in offense or in defense.—*Ibid.*, no. 32.

Just as you ought to observe justice in beginning a war, so you should wage it and carry it on justly. For it is not enough to have a just cause for beginning a war, unless it is also waged with justice. . . .

And this justice of which we speak seems in the first place to consist in this: that we should inform of our deliberations the one against whom we have decided to make war.—Gentili, *De jure belli,* Book II, chap. i.

After war has been begun, and during the whole period thereof up to the attainment of victory, it is just to visit upon the enemy all losses which may seem necessary either for obtaining satisfaction or for securing victory, provided that these losses do not involve an intrinsic injury to innocent persons, which would be in itself an evil.—Suárez, *De bello,* sec. vii, no. 6.

Just Causes of War

A war is never undertaken by the ideal State, except in defence of its honour or its safety.—Cicero, *De re publica* III. xxii. 33.

It is . . . agreed that, according to Cicero, a State should engage in war for the safety which preserves the State permanently in existence, though its citizens change; as the foliage of an olive or laurel, or any tree of this kind, is perennial, the old leaves being replaced by fresh ones.—St. Augustine, *De civitate Dei* XXII. vi.

[28] See also the next rubric, "Just Causes of War."

A just war is wont to be described as one that avenges wrongs, when a nation or state has to be punished, for refusing to make amends for the wrongs inflicted by its subjects, or to restore what it has seized unjustly.—St. Augustine, *Questions on Heptateuch,* Book VI, qu. x.[29]

There is a single and only just cause for commencing a war, namely, a wrong received.—Vitoria, *De iure belli,* no. 13.

There can not be a just war where no wrong has previously been done (*Secunda Secundae* qu. 40, art. 1).—Vitoria, *De Indis,* Sec. III, no. 11.

War cannot be declared for any offense at all, but only for the purpose of warding off an injury.—Bellarmine, *De laicis* xv (Murphy trans., p. 71).

It is one of the first of the obligations connected with war to abstain from making war except on just grounds, so that the law of human society may be preserved inviolate, and to repress all lust of conquest, as being not only inconsistent with justice but also fraught, ordinarily, with many other ills. —Ayala, *De jure et officiis bellicis et disciplina militari,* Book II, chap. i, § 1.

There should be grounds for war, and they should not be trivial . . . For why should a trifling ailment have a powerful remedy?—Gentili, *De jure belli,* Book I, chap. vii.

A Christian prince may not declare war save either by reason of some injury inflicted or for the defence of the innocent. . . . If any state wishes to worship the one God and observe the law of nature, or to listen to preachers who teach these things, and if the sovereign of that state forcibly prevents it from doing so, there would spring up in consequence a just ground for war to be waged by some other prince, even if the latter should be an unbeliever, and guided solely by natural reason; because that war would be a just defence of innocent persons.—Suárez, *De bello,* sec. v, nos. 6, 8.

There can be no just war without an underlying cause of a legitimate and necessary nature. . . . Now, that just and sufficient reason for war is the infliction of a grave injustice which cannot be avenged or repaired in any other way.—*Ibid.,* sec. iv, no. 1.

It is not every cause that is sufficient to justify war, but only those causes which are serious and commensurate with the losses that the war would

[29] St. Thomas Aquinas adopts without reservation the view of St. Augustine, quoting this passage verbatim in II.–II, qu. 40, art. 1.

occasion. For it would be contrary to reason to inflict very grave harm because of a slight injustice. In like manner, a judge can punish, not all offences whatsoever, but only those which are opposed to the common peace and to the welfare of the realm.—*Ibid.*, no. 2.

War is waged: Firstly, in defense of ourselves and what belongs to us; secondly, to recover things taken from us; thirdly, to avenge a wrong suffered by us; fourthly, to secure peace and security.—Vitoria, *De iure belli*, no. 44.

It should be added that it is a sufficient cause for war if an injury of this kind be inflicted either upon a prince himself or upon his subjects; for the prince is guardian of his state and also of his subjects. Furthermore, the cause is sufficient if the wrong be inflicted upon any one who has placed himself under the protection of a prince, or even if it be inflicted upon allies or friends. . . . A war may also be justified on the grounds that he who has inflicted an injury should be justly punished, if he refuses to give just satisfaction for that injury, without resort to war.—Suárez, *De bello*, sec. iv, nos. 3, 5.

It must be noted that there are various kinds of injuries which are causes of a just war. These may be grouped under three heads. One of the heads would be the seizure by a prince of another's property, and his refusal to restore it. Another head would be his denial, without reasonable cause, of the common rights of nations, such as the right of transit over highways, trading in common, etc. The third would be any grave injury to one's reputation or honor.—*Ibid.*, no. 3.

A State is within its rights not only in defending itself, but also in avenging itself and its subjects and in redressing wrongs.—Vitoria, *De iure belli*, no. 5.

In the case of defensive warfare, (as Cajetan, who treats of the matter admirably, says,) any king whatsoever and any commonwealth whatsoever —for example, this city—may defend themselves.—Vitoria, *De bello*, art. I, § 3.[30]

A defence is just which anticipates dangers that are already meditated and prepared, and also those which are not meditated, but are probable and

[30] Trans. in J. B. Scott, *The Spanish Origin of International Law*, Part I, Appendix F, p. cxvi.

possible. This last word, however, is not to be taken literally, for in that case my statement would be that it is just to resort to a war of this kind as soon as any one becomes too powerful, which I do not maintain.—Gentili, *De jure belli,* Book I, chap. xiv.

Aggressive war . . . is frequently waged against non-subjects. Consequently, it is necessary that the latter shall have committed some wrong on account of which they render themselves subjects. Otherwise, on what ground could they be deserving of punishment or subject to an alien jurisdiction?—Suárez, *De bello,* sec. iv, no. 1.

The cause of allies and friends is a just cause of war, a State being quite properly able, as against foreign wrongdoers, to summon foreigners to punish its enemies.—Vitoria, *De Indis,* Sec. III, no. 17.

The principal just causes of war are: the defense of our own empire, of our persons, of our friends, of our allies, and of our property. . . . A war is based on a just cause, again, when it is waged in order to regain from the enemy something which he is forcibly and unjustly detaining. . . . Another just cause of war is to take vengeance for some wrong which has been unjustifiably inflicted.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. ii, § 11.

An expedient cause for making war will be the right of taking vengeance for a wrong which one has suffered. And it is expedient, since one who does not take vengeance for a wrong invites another wrong.—Gentili, *De jure belli,* Book I, chap. xviii.

A king . . . may engage in war because of a treaty and for the purpose of aiding some other prince who is suffering injury.—Vitoria, *De bello,* art. I, § 5.[31]

If it is clearly evident that the subjects are suffering unjustly because of their king, it is permissible for [foreign] princes to wage war against that king. . . . And, in general, when subjects have a right to war against their king, it is licit for [foreign] princes to war in defence of that people. The reason supporting this assertion is that the people in question are an innocent people, and that, by natural law, princes may and can defend the [whole] world, lest injury be inflicted upon it.—*Ibid.,* § 6.[32]

[31] Trans. in J. B. Scott, *The Spanish Origin of International Law,* Part I, Appendix F, p. cxvii.
[32] *Ibid.,* pp. cxvii–cxviii.

If men clearly sin against the laws of nature and of mankind, I believe that any one whatsoever may check such men by force of arms.—Gentili, *De jure belli*, Book I, chap. xxv.

In order to defend the innocent, it is allowable to use violence against the infidels . . . that they may be prevented from sacrificing infants to their gods; inasmuch as such a war is permissible in the order of charity and is, indeed, a positive duty if it can be conveniently waged.—Suárez, *De mediis*, sec. iv, no. 4.

If men in another state live in a manner different from that which we follow in our own state, they surely do us no wrong. Therefore, since war against them will be either vindictive or punitive, it can in neither event be just; for we have not been injured, so that we can justly take vengeance, nor are they our subjects, so that it is our part to chastise them.—Gentili, *De jure belli*, Book I, chap. ix.

If the causes for war were really due to nature, every war arising from them would also be just. But the causes are not of that kind. Men are not foes of one another by nature. But our acts and our customs, whether these be like or unlike, cause harmony or discord among us. They say that men are not friends by nature, a statement which I do not accept.—*Ibid.*, chap. xii.

Although I maintain that no natural cause for war exists, yet there are reasons because of which we undertake wars under Nature's guidance. For example, for defence and when we make war because something is refused us which Nature herself has bestowed upon mankind; and therefore war is resorted to, because a law of nature is violated.—*Ibid.*, chap. xiii.

It is the nature of wars for both sides to maintain that they are supporting a just cause. In general, it may be true in nearly every kind of dispute, that neither of the two disputants is unjust. . . . We are driven to this distinction by the weakness of our human nature, because of which we see everything dimly, and are not cognizant of that purest and truest form of justice, which cannot conceive of both parties to a dispute being in the right. . . .

. . . Therefore we aim at justice as it appears from man's standpoint . . . If it is doubtful on which side justice is, and if each side aims at justice, neither can be called unjust.—*Ibid.*, chap. vi.

It happens in the cases of individuals, if there is a dispute at law, and also in those of communities, that actions are disallowed because of the lapse of

time; but is the same thing true of action in war? In other words, is that which might once have been a just cause for war, also just after the lapse of many years? If actions are prevented on this ground by the law, why should not the same thing be true of causes for war and these actions under arms? *Usucapio* and *praescriptio* were introduced for the public good, in order that suits might have some limit. Why should not wars also be limited?—Gentili, *De jure belli,* Book I, chap. xxii.

Unjust War

Those wars are unjust which are undertaken without provocation. For only a war waged for revenge or defence can actually be just. . . .

No war is considered just unless it has been proclaimed and declared, or unless reparation has first been demanded.[33]—Cicero, *De re publica* III. xxii. 35.

Not every kind and degree of wrong can suffice for commencing a war. . . . It is not lawful for slight wrongs to pursue the authors of the wrongs with war, seeing that the degree of the punishment ought to correspond to the measure of the offence.—Vitoria, *De iure belli,* no. 14.

In war, men are despoiled of their property, their liberty, and their lives; and to do such things without just cause is absolutely iniquitous.—Suárez, *De bello,* sec. iv, no. 1.

It may happen that the war is declared by the legitimate authority, and for a just cause, and yet be rendered unlawful through a wicked intention. Hence Augustine says (*Contra Faust.* xxii. 74): "The passion for inflicting harm, the cruel thirst for vengeance, an unpacific and relentless spirit, the fever of revolt, the lust of power, and suchlike things, all these are rightly condemned in war."—St. Thomas Aquinas, II.–II, qu. 40, art. 1.

One who has in ignorance gone in an unjust war and subsequently is convinced of its injustice . . . is bound when he learns of its injustice to give back what he has taken away and not yet consumed.—Vitoria, *De iure belli,* no. 33.

Whoever begins a war without just cause, sins not only against charity, but also against justice; and hence he is bound to make reparation for all the harm that results [illegible]

The state of war has its rightful source in justice and . . . consequently, if war is made contrary to justice, there arises from that fact an obligation to make reparation for this injury.—*Ibid.*, sec. vii, no. 5.

No war is just the conduct of which is manifestly more harmful to the State than it is good and advantageous; and this is true regardless of any other claims or reasons that may be advanced to make of it a just war. . . . Nay more, since one nation is a part of the whole world, and since the Christian province is a part of the whole Christian State, if any war should be advantageous to one province or nation but injurious to the world or to Christendom, . . . for this very reason, that war is unjust.—Vitoria, *De potestate civili*, no. 13.

If some one city can not be recaptured without greater evils befalling the State, such as the devastation of many cities, great slaughter of human beings. . . . it is indubitable that the prince is bound rather to give up his own rights and abstain from war.—Vitoria, *De iure belli*, no. 33.

If one prince begins a war upon another, even with just cause, while exposing his own realm to disproportionate loss and peril, then he will be sinning not only against charity, but also against the justice due to his own state. The reason for this assertion is as follows: a prince is bound in justice to have greater regard for the common good of his state than for his own good; otherwise, he will become a tyrant.—Suárez, *De bello*, sec. iv, no. 8.

We must assume that the opposing party is not ready to make restitution, or to give satisfaction; for if he were so disposed, the warlike aggression would become unjust.—*Ibid.*, sec. iv, no. 5.

Unjust Causes of War

Extension of empire is not a just cause of war.—Vitoria, *De iure belli*, no. 11.

Difference of religion is not a cause of just war.—*Ibid.*, no. 10.

Neither the personal glory of the prince nor any other advantage to him is a just cause of war. . . . For a prince ought to subordinate both peace and war to the common weal of his State and not spend public revenues in quest of his own glory or gain, much less expose his subjects to danger on that account.—*Ibid.*, no. 12.

Since the end of war is peace and public tranquillity, it is not lawful to undertake war for any other end, hence those sin seriously, whether rulers

or soldiers, who begin a war either to injure someone, or to extend their empire, or to show warlike prowess, or for any other cause than the common good, even if lawful authority and a just cause are not lacking.—Bellarmine, *De laicis* xv (Murphy trans., p. 73).

There was an old error current among the Gentiles, who thought that the rights of nations were based on military strength, and that it was permissible to make war solely to acquire prestige and wealth; a belief which, even from the standpoint of natural reason, is most absurd. . . . If the grounds or purposes which the Gentiles had in view (for example, ambition, avarice, and even vainglory or a display of ferocity) were legitimate and sufficient, any state whatsoever could aspire to these ends; and hence, a war would be just on both sides, essentially and apart from any element of ignorance. This supposition is entirely absurd; for two mutually conflicting rights cannot both be just.—Suárez, *De bello,* sec. iv, Introduction and no. 1.

Religion and War

War is no argument for the truth of the Christian faith.—Vitoria, *De Indis,* Sec. II, no. 15.

Christian princes—whether they be secular, or lords of the Church—may not deprive infidels of . . . power and sovereignty merely on the ground that they are infidels, when no injury has been done by them.—Vitoria, *De potestate civili,* no. 9.

The Indians in question are not bound, directly the Christian faith is announced to them, to believe it, in such a way that they commit mortal sin by not believing it, merely because it has been declared and announced to them that Christianity is the true religion and that Christ is the Saviour and Redeemer of the world, without miracle or any other proof or persuasion. . . .

If the faith be presented to the Indians in the way named only and they do not receive it, the Spaniards cannot make this a reason for waging war on them or for proceeding against them under the law of war. This is manifest, because they are innocent in this respect and have done no wrong to the Spaniards. . . .

If the Christian faith be put before the aborigines with demonstration, that is, with demonstrable and reasonable arguments, and this be accompanied by an upright life, well-ordered according to the law of nature (an argument which weighs much in confirmation of the truth), and this be

done not once only and perfunctorily, but diligently and zealously, the aborigines are bound to receive the faith of Christ under penalty of mortal sin. . . .

It is not sufficiently clear to me that the Christian faith has yet been so put before the aborigines and announced to them that they are bound to believe it or commit fresh sin. I say this because (as appears from my second proposition) they are not bound to believe unless the faith be put before them with persuasive demonstration. Now, I hear of no miracles or signs or religious patterns of life; nay, on the other hand, I hear of many scandals and cruel crimes and acts of impiety. Hence it does not appear that the Christian religion has been preached to them with such sufficient propriety and piety that they are bound to acquiesce in it, although many religious and other ecclesiastics seem both by their lives and example and their diligent preaching to have bestowed sufficient pains and industry in this business, had they not been hindered therein by others who had other matters in their charge. . . .

Although the Christian faith may have been announced to the Indians with adequate demonstration and they have refused to receive it, yet this is not a reason which justifies making war on them and depriving them of their property. This conclusion is definitely stated by St. Thomas (*Secunda Secundae* qu. 10. art. 8), where he says that unbelievers who have never received the faith, like Gentiles and Jews, are in no wise to be compelled to do so. This is the received conclusion of the doctors alike in the canon law and the civil law.—Vitoria, *De Indis,* Sec. II, nos. 10, 11, 13–15.

War may not be declared against infidels merely because they are infidels, not even on the authority of emperor or Pope, for their infidel character does not divest them of those rights of ownership which they have under the law universal [*jus gentium*], and which are given not to the faithful alone but to every reasonable creature.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. ii, § 28.

Although it is said: "Go, preach the Gospel to every creature," it does not therefore follow that any creature which refuses to hear must be forced to do so by war and arms.—Gentili, *De jure belli,* Book I, chap. xxv.

Now if religion is of such a nature that it ought to be forced upon no one against his will, and if a propaganda which exacts faith by blows is called a strange and unheard-of thing, it follows that force in connexion with religion is unjust.—*Ibid.,* chap. ix.

The Spanish writer Vitoria, following other writers of the highest authority, has the most certain warrant for his conclusion that Christians, whether of the laity or of the clergy, cannot deprive infidels of their civil power and sovereignty merely on the ground that they are infidels, unless some other wrong has been done by them.—Grotius, *Mare liberum*, chap. ii.

Vitoria . . . is right in saying that the Spaniards have no more legal right over the Indians because of their religion, than the Indians would have had over the Spaniards if they had happened to be the first foreigners to come to Spain.—*Ibid.*

Surely it is a heresy to believe that infidels are not masters of their own property; consequently, to take from them their possessions on account of their religious belief is no less theft and robbery than it would be in the case of Christians.—*Ibid.*

However persuasively and sufficiently the True Faith has been preached to the heathen—former subjects of Christian princes or apostates are quite another question—if they are unwilling to heed it, that is not sufficient cause to justify war upon them, or to despoil them of their goods.—*Ibid.*, chap. iv.

I have often heard that it has been decreed by the Council of Spain, and by the Churchmen, especially the Dominicans, that the Americans (Aztecs and Indians) should be converted to the Faith by the preaching of the Word alone, and not by war, and even that their liberty of which they had been robbed in the name of religion should be restored. This policy is said to have received the approval of Pope Paul III, and of Emperor Charles V, King of the Spains.—*Ibid.*, chap. iv.

Faith should be voluntary; therefore, the means to faith should also be voluntary; consequently, coercion to the faith in the case of the unbelievers in question is not permissible . . . and accordingly, coercion to the hearing of the faith is also impermissible.—Suárez, *De mediis*, sec. ii, no. 2.

It is essentially wrong to force unbelievers who are not subjects, to embrace the faith.—*Ibid.*, sec. iii, no. 5.

It is in nowise permissible to coerce unbelievers who are non-subjects, to a hearing of the faith.—*Ibid.*, sec. ii, no. 6.

Wherever the power for the punishment of unbelief is wanting, there is lacking also the power to compel an acceptance of the faith.—*Ibid.*, sec. iii, no. 7.

Since the laws of religion do not properly exist between man and man, therefore no man's rights are violated by a difference in religion, nor is it lawful to make war because of religion. Religion is a relationship with God. Its laws are divine, that is between God and man; they are not human, namely, between man and man. Therefore a man cannot complain of being wronged because others differ from him in religion.—Gentili, *De jure belli,* Book I, chap. ix.

Religion is a part of the law of nature and therefore that law will not protect those who have no share in it. And yet I will add this: that no nation exists which is wholly destitute of religion. Name me such a nation, if you can. Those are not without the pale of this law of nature who are victims of human liability to error and who, although led by the desire for what is good, adopt a religion that is evil. . . . Hence they ought to be instructed and patiently dealt with, not constrained nor exterminated.—*Ibid.*

Missionaries

Christians have a right to preach and declare the Gospel in barbarian lands.—Vitoria, *De Indis,* Sec. III, no. 9.

If the Indians allow the Spaniards freely and without hindrance to preach the Gospel, then whether they do or do not receive the faith, this furnishes no lawful ground for making war on them and seizing in any other way their lands. . . . There cannot be a just war where no wrong has previously been done (*Secunda Secundae,* qu. 40, art. 1).—*Ibid.,* no. 11.

The grounds on which a just war may be waged with infidels are, then, those on which one may be waged with any other people, and also that they are found hindering by their blasphemies and false arguments the Christian faith and also the free preaching of the Gospel rule, this being a wrong to Christians, who are entitled to preach the Gospel over the whole world.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. ii, § 30.

If any nation should worship the one God and observe the laws of nature, while another nation practiced idolatry and lived contrary to natural reason, then the former state would have the right to send missionaries to instruct [the citizens of the latter state], and to free them from their errors. And if this action were forcibly prevented, then war could justly follow.—Suárez, *De bello,* sec. v, no. 8.

One ought first to try peaceful means, inviting and repeatedly urging infidel princes and states to permit the preaching of the faith in their realms,

and to offer or allow security to persons who come into or dwell within their domains for the purpose of performing that task of preaching. . . . If the unbelieving princes resist, and do not grant entrance, then, in my opinion and on account of the reasons given above, they may be coerced by the sending of preachers accompanied by an adequate army.—Suárez, *De mediis,* sec. i, no. 10.

If, after the preachers have been received, the infidels should kill them or treat them wrongfully, when the victims are blameless, and for no other reason than that they have preached the Gospel, then an even better reason for just defence and, indeed, for righteous vengeance, has arisen, the latter sometimes being necessary in order that other infidel chiefs may be coerced and may fear to practice like acts of tyranny. For such [defensive action] is in harmony with the natural law and is not opposed to any command of Christ.—*Ibid.*

Whether Soldiers and Subjects Should Inquire into the Justice of War

It is not for subjects to inquire too curiously which side took up arms with the better right. And hence many soldiers do not know whether or not their wars are just. Subjects are excused, but not others who fight for an unjust cause. Subjects are excused regardless of the question whether the war is offensive or defensive.—Gentili, *De jure belli,* Book I, chap. xxv.

Generals and other chief men of the kingdom, whenever they are summoned for consultation to give their opinion on beginning a war, are bound to inquire diligently into the truth of the matter; but if they are not called, they are under no greater obligation to do so than others who are common soldiers.—Suárez, *De bello,* sec. vi, no. 7.

Lesser folk who have no place or audience in the prince's council or in the public council are under no obligation to examine the causes of the war, but may serve in it in reliance on their betters. . . . Nevertheless the proofs and tokens of the injustice of the war may be such that ignorance would be no excuse even to subjects of this sort who serve in it.—Vitoria, *De iure belli,* nos. 25, 26.

The common people, who are not admitted to the council of the prince, are not under obligation to ascertain the just cause of the war, but may [simply] follow their king.—Vitoria, *De bello,* art. I, § 8.[34]

[34] Trans. in J. B. Scott, *The Spanish Origin of International Law,* Part I, Appendix F, pp. cxviii–cxix.

There is no doubt that in a defensive war subjects may, even though the matter be doubtful, follow their prince to the war; nay, that they are bound to follow him, and also in an offensive war.—Vitoria, *De iure belli*, no. 31.

Common soldiers, as subjects of princes, are in no wise bound to make diligent investigation, but rather may go to war when summoned to do so, provided it is not clear to them that the war is unjust.—Suárez, *De bello*, sec. vi, no. 8.

[If] the soldiers are entirely ignorant of the basis of the justice or injustice underlying the war . . . they are in no wise bound to make inquiry, being sufficiently supported by the fact that they have relied upon the authority of their sovereign.—*Ibid.*, no. 9.

If the arguments showing the war to be unjust were such that the soldiers themselves were unable to give a satisfactory answer, then they would be bound to inquire into the truth in some way. Even this obligation, however, is to be imposed, not readily, but only in case those arguments render the justice of the war extremely doubtful, for, in that case, it would seem that the soldiers have inclined towards a moral judgment that the war was unjust; otherwise, however, if they have probable reasons for thinking that the war is just, they may legitimately conform their conduct to these reasons. —*Ibid.*

If the doubt [as to the justice of a war] is purely negative, it is probable that the soldiers . . . may [rightfully] take part in that war without having made any examination of the question, all responsibility being thrown upon the prince to whom they are subject. We assume, to be sure, that this prince enjoys a good reputation among all men. This is clearly the opinion supported by Vitoria and agreed to by other Thomists.—*Ibid.*, no. 12.

To this end, indeed, it will be sufficient if the soldiers consult prudent and conscientious men upon the question of whether or not they are in an absolute sense able to take part in such a war. And if the soldiers in question form a single political body, and have their own chiefs, the inferiors will certainly satisfy all requirements, if each person examines the question of the justice of the war, through his own chief or prince, and follows the judgment of that authority. Finally, if the arguments on both sides contain an equal [element of] probability, the soldiers may under such circumstances conduct themselves as if the doubt were purely negative; for the balance is then equal, and the authority of the prince turns the scale.—*Ibid.*, sec. vi, no. 12.

Conscientious Objectors

It is essential for a just war that an exceedingly careful examination be made of the justice and causes of the war and that the reasons of those who on grounds of equity oppose it be listened to.—Vitoria, *De iure belli*, no. 21.

Subjects whose conscience is against the justice of a war may not engage in it whether they be right or wrong.—*Ibid.*, no. 23.

If a subject is convinced of the injustice of a war, he ought not to serve in it, even on the command of his prince.—*Ibid.*, no. 22.

If it is evident that the war is unjust, or if this is known to be the case, or if the subjects are conscious that the war is unjust, they may not fight, even when the prince exercises compulsion upon them.—Vitoria, *De bello*, art. I, no. 8.[35]

When the cause of war is not clearly unjust, but doubt does exist, it is permissible for soldiers to engage in the war. . . . Under such circumstances, the soldier is confronted by two conflicting doubts; if he does go to battle, he is in danger of prosecuting an unjust war; if he does not go, he exposes himself to the danger of deserting his king and country in their time of need; when one is placed between two perils, he ought to choose that which is less evil; and it is less evil to injure enemies than to injure one's own state; therefore. . . . —*Ibid.*[36]

The Law of War

In war everything is lawful which the defense of the common weal requires . . . for the end and aim of war is the defense and preservation of the State. Also, a private person may do this in self-defense, as has been proved. Therefore much more may a State and a prince.—Vitoria, *De iure belli*, no. 15.

The rules relating to war ought to be for the common good of all and not for the private good of the prince.—*Ibid.*, no. 12.

Alike in beginning a war and in carrying it on and in ending it, law has a most important position and so has good-faith.—Ayala, *De jure et officiis bellicis et disciplina militari*, Book I, chap. ii, §§ 1, 2.

[35] Trans. in J. B. Scott, *The Spanish Origin of International Law*, Part I, Appendix F, p. cxviii.

[36] Trans. in J. B. Scott, *ibid.*, p. cxix.

Although it may sometimes happen (it will not occur very often, as you will learn forthwith) that injustice is clearly evident on one of the two sides, nevertheless this ought not to affect the general principle, and prevent the laws of war from applying to both parties. . . . Therefore no change must be made in this law of the enemy and of war; for it is impartial to both sides, just as in the contests of the Forum the law is impartial towards each of the litigants, until sentence has been pronounced in favour of one or the other of them. And then the defeated party, who contended unjustly, will suffer severe punishment at the hands of the victor because of his injustice.

But if the unjust man gain the Victory, neither in a contention in arms nor in the strife carried on in the garb of peace is there any help for it. Yet it is not the law which is at fault, but the execution of the law. . . .

Perhaps you may console yourself by saying with the theologians and the philosophers that there is no sin without retribution, since every wicked deed is its own punishment. . . . Besides, there is ill repute in the eyes of others and remorse in one's own heart, as the philosophers have made clear. There is also Hell, of which the philosophers have told us by induction, and the theologians from knowledge.—Gentili, *De jure belli,* Book I, chap. vi.

We hold the firm belief that questions of war ought to be settled in accordance with the law of nations, which is the law of nature.—*Ibid.,* chap. i.

The rights of war which may be invoked against men who are really guilty and lawless differ from those which may be invoked against the innocent and ignorant.—Vitoria, *De Indis,* Sec. III, no. 6.

Declaration of War

As for war, humane laws touching it are drawn up in the fetial code of the Roman People under all the guarantees of religion; and from this it may be gathered that no war is just, unless it is entered upon after an official demand for satisfaction has been submitted or warning has been given and a formal declaration made.—Cicero, *De officiis* I. xi. 36.

If war is not declared when it ought to be declared, then war is said to be carried on treacherously; and such a war is unjust, detestable, and savage. —Gentili, *De jure belli,* Book II, chap. ii.

In a war for revenge . . . war should be proclaimed in advance by those who seek vengeance, whether the injury which has been done them is recent or of long standing. . . .

. . . War is waged without being declared, if the acts of injustice are continued or are still going on.—Gentili, *De jure belli,* Book II, chap. ii.

When war is undertaken for the purpose of necessary defence, the declaration is not at all required.—*Ibid.*

A war which . . . is declared without legitimate authority, is contrary not only to charity, but also to justice, even if a legitimate cause for it exists. The reason . . . is that such an act is performed without legitimate jurisdiction, and is consequently an illegitimate act.—Suárez, *De bello,* sec. ii, no. 6.

Wanton Destruction Condemned

A doubt arises as to whether or not it is permissible in war to perform [injurious] acts which are not to our own advantage. For example, a question is raised as to whether the Spaniards may licitly set fire to the cities of the French, and to their fields; for this does not promote the welfare of the Spaniards.

I reply that to do so wantonly is diabolical; this fire is the fire of hell; for such an act is not needful in the attainment of victory.—Vitoria, *De bello,* art. I, § 19.[37]

It is undoubtedly unjust in the extreme to deliver up a city, especially a Christian city, to be sacked, without the greatest necessity and weightiest reason.—Vitoria, *De iure belli,* no. 52.

If a war can be carried on effectively enough without the spoliation of the agricultural population and other innocent folk, they ought not to be despoiled.—*Ibid.,* no. 40.

To destroy those things which yield no profit in themselves and whose destruction does no damage to the enemy, such as temples, colonnades, statues, and other things of that kind, is the act of one who is mad and utterly raving. For it is not fitting for a good man to carry on a war to the death with the enemy, but only until the offences of those who have done wrong have been punished and corrected.—Gentili, *De jure belli,* Book II, chap. xxiii.

Noncombatants

The deliberate slaughter of the innocent is never lawful in itself.—Vitoria, *De iure belli,* no. 35.

[37] Trans. in J. B. Scott, *The Spanish Origin of International Law,* Part I, Appendix F, p. cxxiv.

It is never right to slay the guiltless, even as an indirect and unintended result, except when there is no other means of carrying on the operations of a just war.—*Ibid.*, no. 37.

In war it is not permissible to slay the lowly, nor pilgrims who are not a cause of the war, and do not lend aid in it.—Vitoria, *De bello*, art. I, § 13.[38]

Even in war with the Turks it is not allowable to kill children. This is clear, because they are innocent. Aye, and the same holds with regard to the women of unbelievers. This is clear, because so far as the war is concerned, they are presumed innocent; but it does not hold in the case of any individual woman who is certainly guilty. Aye, and this same pronouncement must be made among Christians with regard to harmless agricultural folk, and also with regard to the rest of the peaceable civilian population, for all these are presumed innocent until the contrary is shown. . . . The same principle applies to clerics and members of a religious order, for they in war are presumed innocent unless the contrary be shown, as when they engage in actual fighting.—Vitoria, *De iure belli*, no. 36.

Severity towards women and the young was always reckoned very disgraceful, their very sex and age exempting them from the hazards of battle and the rage of the conqueror. . . . The canons indeed contain an injunction that the following be spared: clergy, monks, converts, foreigners, merchants, and country folk, but this (says Panormitanus) has been abrogated by contrary usage. I do not think, however, that it has been abrogated as regards the clergy, upon whom it is forbidden to lay hands under penalty of anathema—unless indeed they take active part in the war, for he who misuses a privilege loses it.—Ayala, *De jure et officiis bellicis et disciplina militari*, Book I, chap. v, § 25.

Children should always be spared, and so should women. . . .
. . . But in saying this I make an exception of those women who perform duties of men which are beyond the powers of the sex in general.—Gentili, *De jure belli*, Book II, chap. xxi.

What has been said of children I should also wish to apply to those of advanced years; for both those periods of life are feeble and their privileges are often similar.—*Ibid.*

[38] Trans. in J. B. Scott, *ibid.*, Part I, Appendix F, p. cxxii.

Those who give all their time to religion are free in other respects and also from arms. . . . If those religious men take up arms, they are not spared. —Gentili, *De iure belli,* Book II, chap. xxii.

To return now to the peasants. . . . The law which we are now discussing and defending is supported by the consideration that war is a contention of arms, and that therefore there can be no war with unarmed men. . . . If the farmers are not harmless but are armed, they are not spared.—*Ibid.*

Innocent persons as such may in nowise be slain, even if the punishment inflicted upon their state would, otherwise, be deemed inadequate; but incidentally, they may be slain, when such an act is necessary in order to secure victory.—Suárez, *De bello,* sec. vii, no. 15.

It is implicit in natural law that the innocent include children, women, and all unable to bear arms; by the *ius gentium,* ambassadors; and among Christians, by positive [canon] law (*Decretals,* I. xxxiv. 2) religious persons, priests, etc.—*Ibid.,* no. 10.

Strangers and foreigners, since they form no part of the state . . . are not reckoned among the enemy unless they are allies in the war.—*Ibid.*

The innocent . . . include not only the persons enumerated above, but also those who are able to bear arms, if it is evident that, in other respects, they have not shared in the crime nor in the unjust war; for the natural law demands that, generally speaking, no one who is actually known to be free from guilt, shall be slain.—*Ibid.,* sec. vii, no. 15.

Immunity in War

Enemies who flee for refuge to a church, after victory is attained . . . if peril no longer threatens from them, . . . enjoy complete ecclesiastical immunity.—Vitoria, *De bello,* art. II, § 10.[39]

If the enemy store up their goods in churches, it is entirely licit to seize those goods; and . . . such stored possessions do not enjoy ecclesiastical immunity.—*Ibid.,* § 5.[40]

It is not licit to demolish churches; that is, not unless the enemy are using the churches as citadels; or again, if we fear that the enemy may fortify

[39] Trans. in J. B. Scott, *The Spanish Origin of International Law,* Part I, Appendix F, p. cxxix.

[40] *Ibid.,* p. cxxvii.

Those who give all their time to religion are free in other respects and also from arms. . . . If those religious men take up arms, they are not spared. —Gentili, *De iure belli,* Book II, chap. xxii.

To return now to the peasants. . . . The law which we are now discussing and defending is supported by the consideration that war is a contention of arms, and that therefore there can be no war with unarmed men. . . . If the farmers are not harmless but are armed, they are not spared.—*Ibid.*

Innocent persons as such may in nowise be slain, even if the punishment inflicted upon their state would, otherwise, be deemed inadequate; but incidentally, they may be slain, when such an act is necessary in order to secure victory.—Suárez, *De bello,* sec. vii, no. 15.

It is implicit in natural law that the innocent include children, women, and all unable to bear arms; by the *ius gentium,* ambassadors; and among Christians, by positive [canon] law (*Decretals,* I. xxxiv. 2) religious persons, priests, etc.—*Ibid.,* no. 10.

Strangers and foreigners, since they form no part of the state . . . are not reckoned among the enemy unless they are allies in the war.—*Ibid.*

The innocent . . . include not only the persons enumerated above, but also those who are able to bear arms, if it is evident that, in other respects, they have not shared in the crime nor in the unjust war; for the natural law demands that, generally speaking, no one who is actually known to be free from guilt, shall be slain.—*Ibid.,* sec. vii, no. 15.

Immunity in War

Enemies who flee for refuge to a church, after victory is attained . . . if peril no longer threatens from them, . . . enjoy complete ecclesiastical immunity.—Vitoria, *De bello,* art. II, § 10.[39]

If the enemy store up their goods in churches, it is entirely licit to seize those goods; and . . . such stored possessions do not enjoy ecclesiastical immunity.—*Ibid.,* § 5.[40]

It is not licit to demolish churches; that is, not unless the enemy are using the churches as citadels; or again, if we fear that the enemy may fortify

[39] Trans. in J. B. Scott, *The Spanish Origin of International Law,* Part I, Appendix F, p. cxxix.

[40] *Ibid.,* p. cxxvii.

the churches, to be used as citadels, it is licit to seize these churches in anticipation, and to demolish them. I would point out that this should be understood as referring to cases of great necessity; if the necessity is not great, the churches should be preserved.—*Ibid.*[41]

Among Christians the immunity of ecclesiastical persons and property has also been introduced.—Suárez, *De bello,* sec. vii, no. 14.

If men seek retreat in [churches] . . . solely to protect their own lives, they should enjoy ecclesiastical immunity; but if an enemy use a church as a citadel or as a defensive camp, that church may be attacked and burned, even if some disadvantages follow therefrom.—*Ibid.*

A common religion may protect those who flee to sacred places, as if they took refuge in a bond of union which is not loosed by war. "Peoples united by a common religion appeal to one another's consciences."[42] Such is the supplication of those who flee to sacred places; and because they entreat, they must be spared.—Gentili, *De jure belli,* Book II, chap. xx.

Allies in Time of War

Allies form one body . . . and their federation thus makes one body of several, and accordingly he who offends one also offends another; and this is true, even though it may be elsewhere provided that an ally is not liable for the offence of an ally.—*Ibid.,* Book III, chap. xxiv.

Although the ally is not called upon to be a judge, but is summoned because he is under obligation to render aid, yet because the obligation does not extend to acts which are unjust, he will not lend aid to an unjust cause. Therefore, the ally will be bound to have regard to justice. This is sometimes expressed in the treaty by saying that if one of the allies should make war upon another member of the federation, all the others should lend their aid to the one whose cause had the greater justice.—*Ibid.,* chap. xviii.

Aid should be rendered to neither of two allies who make war on each other.—*Ibid.*

Enemy Aliens

It deserves notice, too, that when war breaks out between two countries, those of the enemy who are found on the soil of either country may be made

[41] *Ibid.*

[42] Gentili is here quoting Paulus Orosius (fifth-century Latin historian and Christian apologist), *Historiarum adversus Paganos* V.

prisoners despite the fact that they came there in time of peace, and in olden days they would have been made slaves.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. v, § 25.

Neutrals

It is not lawful to slay either foreigners or guests who are sojourning among the enemy, for they are presumed innocent, and in truth they are not enemies.—Vitoria, *De jure belli,* no. 36.

The spoliation of foreigners and travelers on enemy soil, unless they are obviously at fault, is in no wise lawful, they not being enemies.—*Ibid.,* no. 40.

Things not belonging to the enemy cannot lawfully be seized anywhere, nor is it permitted to kill anywhere one who is not an enemy.—Gentili, *De jure belli,* Book II, chap. xxii.

Neither must traders be harmed, when they are taken among the enemy; for they are not enemies, any more than other travellers. Traders are travellers and therefore they are also favored; and reprisals are not made against travellers.—*Ibid.*

It sometimes happens that among the goods of the enemy there are found many of which they themselves are not the owners. May these goods, then, be seized, if they are necessary for reparation? The reply is, that, if the property is immovable, [the victors] certainly cannot retain it; for those from whom it was taken were not the owners; therefore, the victors themselves do not acquire any ownership therein; and consequently, they must restore such goods to the true owners.—Suárez, *De bello,* sec. vii, no. 8.

The foreigner must see to it that he do nothing of his own accord to help the enemy, for he would thus make himself one of the enemy, just as would any one whatever who rendered any kind of assistance to the enemy.[43]—Gentili, *De jure belli,* Book II, chap. xxii.

Goods taken in another's [i.e., a neutral's] territory do not become the property of the captors. Therefore they must be restored to the owner of the territory at his demand.—*Ibid.*

[43] Gentili thus explains his conception of foreigners as distinguished from permanent residents: "Those are called strangers or foreigners who reside in a state without any intention of making a home where they reside. They do not become inhabitants of a place, unless they have fixed their abode and home there with the greater part of their property and with the purpose of remaining for ever. . . . An inhabitant is one of the people, and therefore it seems just that the rights of the enemy should be exercised against inhabitants."—Gentili, *De jure belli,* Book II, chap. xxii.

Right of Capture

It is permissible to seize men in warfare, taking them captive. . . . This fact is evident by the *ius gentium*. No [authority] censures this practice, nor does any condemn the captor to make restitution; on the contrary, such captors may retain these men until the latter are ransomed. Secondly, I maintain that it is no longer permissible to slay them, for they are captives.—Vitoria, *De bello*, art. I, § 17.[44]

Whatever we take from the enemy immediately becomes ours by the Law of Nations; to such an extent, indeed, that even freemen are reduced to slavery for our benefit, although, nevertheless, if they escape from our control, and return to their own people, they regain their former condition. —*Institutes* II. i. 17.

It is a universal rule of the law of nations that whatever is captured in war becomes the property of the conqueror, as is laid down in *Dig.* XLIX. xv. 28 and 24, and in *Decretum*, Part I, dist. i, can. ix, and more expressly in *Inst.* II. i. 17, where it is said that "by the law of nations whatever we take from the enemy becomes ours at once, to such an extent that even men may be brought into slavery to us,"—Vitoria, *De Indis*, Sec. III, no. 8.

Property taken from the enemy . . . becomes ours by Natural Law.—*The Institutes of Gaius*, Second Commentary, § 69.

Anything which is taken from the enemy immediately becomes by the Law of Nations the property of him who takes it.—*Digest* XLI. i. 5, § 7.

As long as a just war continues, those movable goods which are seized, would seem to be, by the *ius gentium*, the property of the one who seizes them.—Vitoria, *De bello*, art. I, § 16.[45]

All movables vest in the seizor by the law of nations, even if in amount they exceed what will compensate for damages sustained.—Vitoria, *De iure belli*, no. 51.

Whatever has been lawfully seized is not in my opinion subject to restitution.—*Ibid.*, no. 40.

A sovereign prince who goes to war because of a wrong done to him is entirely unblamable, when he is prompted, not by diseased pride, but by love

[44] Trans. in J. B. Scott, *op. cit.*, Part I, Appendix F, p. cxxiv.
[45] Trans. in J. B. Scott, *ibid.*, p. cxxiii.

of justice, and when his object is the restraint of a wicked enemy and the defense of his own people. . . . That is the basis of the rule whereby what we capture in a just war becomes our property; and this is a lawful mode of acquisition. . . . This principle is obtained from the law of nations (*jus gentium*) and is approved by the divine, the canon, and the civil law. And the reason of this rule is to be found not so much in the satisfaction given to the wronged party as in the restraint imposed on those who wage unjust wars.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. v, Introduction, and § 1.

It is indisputable that the ownership of things captured in a just war is transferred to the conqueror, but this is subject to a distinction between movables and immovables; for immovables, e. g., land, become public property.—*Ibid.,* § 3.

Let the conclusion be regarded as certain, that property may be taken from the enemy, provided that in so doing justice and equity are observed. The victor will not make everything his own which force and his victory make it possible to seize.—Gentili, *De jure belli,* Book III, chap. iv.

It is permissible to recapt everything that has been lost and any part of the same.—Vitoria, *De iure belli,* no. 16.

It is permissible to seize property equivalent to the entire expense of the war.—Vitoria, *De bello,* art. I, § 16.[46]

There is no doubt about the lawfulness of seizing and holding the land and fortresses and towns of the enemy, so far as is necessary to obtain compensation for the damages he has caused.—Vitoria, *De iure belli,* no. 54.

It is also lawful, in return for a wrong received and by way of punishment, to mulct the enemy of a part of his territory in proportion to the character of the wrong, or even on this ground to seize a fortress or town. . . . A superior judge has competence to mulct the author of a wrong by taking away from him a city (for instance) or a fortress. Therefore a prince who has suffered wrong can do this too, because by the law of war he is put in the position of a judge.—*Ibid.,* no. 56.

It is certainly lawful to despoil the innocent of goods and things which the enemy would use against us. . . . This is clear, because otherwise we could not gain the victory, which is the aim of war.—*Ibid.,* no. 39.

[46] Trans. in J. B. Scott, *op. cit.,* Part I, Appendix F, p. cxxiii.

In order to obtain security and avoid danger from our enemy it is also lawful to seize and hold a fortress or city belonging to him which is necessary for our defense or for taking away from him an opportunity of hurting us.—*Ibid.*, no. 55.

Be it remarked that *res sacrae* are not liable to be seized as booty: for, as they are no one's property . . . they cannot be said to belong to the enemy and it is only enemy property that is capturable as booty.—Ayala, *De jure et officiis bellicis et disciplina militari*, Book I, chap. v, § 15.

It is lawful . . . to despoil the conquered of their adornments.—Gentili, *De jure belli*, Book III, chap. vi.

Soldiers are not allowed to seize anything on their own authority, whether after or even before the victory is won; because they have in themselves no power, but possess it solely through their prince, as his agents, so that they may not justly take anything without his express or implied authorization. —Suárez, *De bello*, sec. vii, no. 7.

It is not permitted the victors in dealing with the conquered to violate the laws of God or of Nature.—Gentili, *De iure belli*, Book III, chap. vi.

The property of those who have fallen into the hands of the enemy, or have died there, whether they had testamentary capacity or not, belongs to those to whom it would have belonged, if they had not been captured.— *Digest* XLIX. xv. 22.

Movable goods captured by soldiers during the war are not to be reckoned by the prince as part of the restitution. For this rule has become a part of the *ius gentium*, through common custom.—Suárez, *De bello*, sec. vii, no. 7.

I shall now say of territories, places, and buildings, that they all remain in the power of the man who holds them at the time when peace is made, unless it has been otherwise provided by a treaty. For they do not return to their former owner, if the enemy are not driven out of them.—Gentili, *De jure belli*, Book III, chap. xvii.

Treatment of Captives

Just as violence is used against him who wages war and offers resistance, so in victories mercy ought . . . to be shown to the captive, especially to him from whom one need fear no disturbance of the peace.—Gratian, *Decretum*, Part II, cau. xxiii, qu. i, can. iii, citing Augustine, *Letters*, clxxxix, no. 4.

Speaking absolutely, there is nothing to prevent the killing of those [guilty persons] who have surrendered or been captured in a just war so long as abstract equity is observed. Many of the rules of war have, however, been fashioned by the law of nations, and it seems to be received in the use and custom of war that captives, after victory has been won (unless perchance they have been routed) and all danger is over, are not to be killed, and the law of nations must be respected, as is the wont among good people.—Vitoria, *De iure belli,* no. 49.

It would involve the ruin of mankind and of Christianity if the victor always slew all his enemies, and the world would soon be reduced to solitude, and wars would not be waged for the public good, but to the utter ruin of the public.—*Ibid.,* no. 48.

Whether victory has already been won or the war is still in progress, if the innocence of any [enemy] soldier is evident and the soldiers can let him go free, they are bound to do so.—*Ibid.,* no. 38.

Except for some special cases captives ought to be spared.—Gentili, *De jure belli,* Book II, chap. xvi.

It is not right that captive leaders of regular enemies should be slain, unless their death is justified by special reasons.—*Ibid.,* Book III, chap. viii.

It is contrary to the laws of war to treat the enemy cruelly because of religion.—*Ibid.,* Book II, chap. xxiii.

By the *ius gentium* the custom has been introduced among Christians that prisoners of war are not to be made slaves by *mancipium,* although they may justly be detained until they are sufficiently punished or redeemed by a just ransom.—Suárez, *De bello,* sec. vii, no. 13.

Pirates

Pirates . . . are the general enemies of all mankind.—Cicero, *The Verrine Orations,* II. iv. 21.

Piratical wars are those which are spread throughout the seas by robbers in their light and fleeting ships.—Isidore, *Etymologies,* Book XVIII, chap. i, § 5.

We exhort the zeal of Your Devotion, that you may be aroused against the marine bandits who, under the pretext of your name, rage furiously

against Christians, so much the more vehemently as you know the good repute of your name is darkened by their depravity; since, although it can be believed that they lie in wait for voyagers without your knowledge, nevertheless, because people say they can be subdued by you, unless you will have checked them, you will not be held innocent.—Gratian, *Decretum*, Part II, cau. xxiii, qu. viii, can. xii, citing Pope John VIII.

With pirates and brigands, who violate all laws, no laws remain in force. —Gentili, *De jure belli*, Book I, chap. iv.

Pirates are common enemies, and they are attacked with impunity by all, because they are without the pale of the law. They are scorners of the law of nations; hence they can find no protection in that law. They ought to be crushed by us . . . and by you in common, and by all men. This is a warfare shared by all nations.—*Ibid.*, Book III, chap. xxiii.

Neither brigands nor pirates are entitled to the privileges of international law, since they themselves have utterly spurned all intercourse with their fellowmen and, so far as in them lies, endeavor to drag back the world to the savagery of primitive times.—*Ibid.*, Book II, chap. viii.

If a war against pirates justly calls all men to arms because of love for our neighbor and the desire to live in peace, so also do the general violation of the common law of humanity and a wrong done to mankind. Piracy is contrary to the law of nations and the league of human society. Therefore war should be made against pirates by all men, because in the violation of that law we are all injured, and individuals in turn can find their personal rights violated.—*Ibid.*, Book I, chap. xxv.

A state of war cannot exist with pirates and robbers, in the opinion of Pomponius and Ulpian. For such men have not through their misconduct emancipated themselves from jurisdiction. One who is a subject does not by rebellion free himself from subjection to the law, says Baldus; and that no one improves his legal status by transgression, is the opinion of Paulus.

There is also another reason why such men do not come under the law of war; namely, because that law is derived from the law of nations, and malefactors do not enjoy the privileges of a law to which they are foes. How can the law, which is nothing but an agreement and a compact, extend to those who have withdrawn from the agreement and broken the treaty of the human race, as Florus puts it.—*Ibid.*, chap. iv.

Mercenaries

Those who are prepared to go forth to every war, who have no care as to whether or not a war is just, but follow him who provides the more pay, and who are, moreover, not subjects [of that person] commit a mortal sin, not only when they actually go to battle, but whenever they are thus willing.[47]—Vitoria, *De bello,* art. I, § 8.[48]

Craft and Stratagems in War

A man may be deceived by what we say or do, because we do not declare our purpose or meaning to him. Now we are not always bound to do this, . . . Wherefore much more ought the plan of campaign to be hidden from the enemy. For this reason among other things that a soldier has to learn is the art of concealing his purpose lest it come to the enemy's knowledge, as stated in the Book on *Strategy* by Frontinus. Suchlike concealment is what is meant by an ambush which may be lawfully employed in a just war.—St. Thomas Aquinas, II.–II, qu. 40, art. 3.

The object of laying ambushes is . . . to deceive the enemy. Now a man may be deceived by another's word or deed in two ways. First, through being told something false, or through the breaking of a promise, and this is always unlawful. No one ought to deceive the enemy in this way, for there are certain "rights of war and covenants, which ought to be observed even among enemies," as Ambrose states (*De offic.* i).—*Ibid.*

Is it permissible to make use of fraud, or deceit, in war? The answer is that it is never permissible to lie. Furthermore, it is not permissible to make use of fraud which is contrary to an agreement entered into with the enemy. However, it is permissible to refrain from revealing certain truths to the latter.—Vitoria, *De bello,* art. III, § 1.[49]

Faith is always to be kept with the enemy.—*Ibid.,* § 3.[50]

In waging war there is one principle which pervades all parts of it; namely, craft and stratagem. . . .

[47] This outspoken condemnation of mercenaries is greatly to Vitoria's credit, for in his day (and long afterwards) the use of hired soldiers was so commonplace a practice that few thought of disapproving it. A somewhat more extended but less vigorous treatment of the subject is also to be found in the disputation *De bello* in Suárez' treatise *De triplici virtute theologica, fide, spe et charitate.*

[48] Trans. in J. B. Scott, *op. cit.,* Part I, Appendix F, p. cxix.

[49] Trans. in J. B. Scott, *The Spanish Origin of International Law,* Appendix F, Part I, p. cxxix.

[50] Trans. in Scott, *ibid.,* p. cxxx.

. . . Our only precaution must be not to allow every kind of craft and every cunning device; for evil is not lawful, but an enemy should be dealt with according to law. And the law is never evil, but it is the practice of the good and the fair.—Gentili, *De jure belli,* Book II, chap. iii.

A stratagem is one thing, treachery another.—*Ibid.,* chap. iv.

In making a contract it is not lawful to deceive the enemy by a falsehood.—*Ibid.,* chap. v.

It is a guileful deed when we desire to make use of poison, and one which is not admitted even against the enemy.—*Ibid.,* chap. vi.

Stratagems are permissible in war . . . in so far as relates to the prudent concealment of one's plans; but not with respect to the telling of lies.—Suárez, *De bello,* sec. viii, no. 23.

Arms and Munitions

Desiring to prevent men from killing each other, We have thought it proper to decree that no private person shall engage in the manufacture of weapons, and that only those shall be authorized to do so who are employed in the public arsenals, or are called armorers; and also that manufacturers of arms should not sell them to any private individual. . . .

Therefore, God directing Our thoughts, We decree by the present law that no private individual, or anyone else whosoever shall, in any province or city of Our Empire, have the right to make or sell arms, or deal in them in any way, but only such as are authorized to manufacture them can do so, and deposit them in Our armory. . . .

But in order that what has been forbidden by Us to private persons and all others may become clear, We have taken pains to enumerate in this law the different kinds of weapons whose manufacture is forbidden. Therefore We prohibit private individuals from either making or buying bows, arrows, double-edged swords, ordinary swords, weapons usually called hunting knives, those styled *zabes,* breast-plates, javelins, lances and spears of every shape whatever, arms called by the Isaurians *monocopia,* others called *sitinnes,* or missiles, shields, and helmets; for We do not permit anything of this kind to be manufactured, except by those who are appointed for that purpose in Our arsenals, and only small knives which no one uses in fighting shall be allowed to be made and sold by private persons.—*Constitutions of Justinian,* Sixth Collection, XIV. i, iii, iv [Emperor Justinian to Basilides, Most Glorious Master of the Imperial Offices.]

Both kinds of coöperation [i. e., of combatants and those who supply arms] are very pertinent to actual wars; and although soldiers seem, in a sense, to coöperate more immediately, nevertheless the persons who furnish arms are ordinarily able to do more harm.—Suárez, *De bello*, sec. vi, no. 11.

Peace Should Be the Aim of War

War . . . should be undertaken in such a way as to make it evident that it has no other object than to secure peace.—Cicero, *De officiis* I. xxxiii. 80.

Wise men wage war only for the sake of peace.—Sallust, *Speech to Caesar*, vi. 2.

Peace is the end sought for by war. For every man seeks peace by waging war, but no man seeks war by making peace.—St. Augustine, *De civitate Dei* XIX. xii.

Peace is not sought after that war may be practised, but war is waged that peace may be acquired.—Gratian, *Decretum*, Part II, cau. xxiii, qu. i, can. iii, citing Augustine, *Letters*, clxxxix (no. 4, Maur. ed.).

Peace should be the object of your desire and war should be waged only as a necessity, and waged only that God may by it deliver men from the necessity and preserve them in peace. For peace is not sought in order to the kindling of war, but war is waged in order that peace may be obtained.—St. Augustine, Letter clxxxix. 6, "To Boniface."

Those who wage war justly aim at peace, and so they are not opposed to peace, except to the evil peace. . . . Hence Augustine says (*Ep. ad Bonif.* clxxxix): "We do not seek peace in order to be at war, but we go to war that we may have peace. Be peaceful, therefore, in warring, so that you may vanquish those whom you war against, and bring them to the prosperity of peace."—St. Thomas Aquinas, II.–II, qu. 40, art. 1, ad 3.

Even those who seek war and dissension, desire nothing but peace, which they deem themselves not to have.—*Ibid.*, qu. 29, art. 2, ad 2.

Men seek by means of war to break this concord, because it is a defective peace, in order that they may obtain peace, where nothing is contrary to their will. Hence all wars are waged that men may find a more perfect peace than that which they had heretofore.—*Ibid.*

As St. Augustine says (*De verbo Domini* and *Ad Bonifacium*), the end and aim of war is the peace and security of the State. . . . There would be

no condition of happiness for the world, nay, its condition would be one of utter misery, if oppressors and robbers and plunderers could with impunity commit their crimes and oppress the good and innocent, and these latter could not in turn retaliate on them.—Vitoria, *De iure belli,* no. 1.

The end of war for which all ought to strive is peace.—Gentili, *De jure belli,* Book III, chap. i.

War, therefore, is justifiable when its object is to procure peaceful existence and freedom from outrage, and when begun in such a way as that peace may appear to be its sole object.—Ayala, *De jure et officiis bellicis et disciplina militari,* Book I, chap. ii, §§ 3–4.

The purpose of war is peace, to which end and to justice (such is said to be the decree of nature) one cannot attain except through bloodshed and those evils arising from strife. In the same way, too, slavery is contrary to nature, and yet at the same time in accord with nature, because those who act contrary to nature have no right to enjoy her blessing of liberty.[51]—Gentili, *De jure belli,* Book I, chap. v.

War is permissible especially for this reason, namely as a way (so to speak) to an upright peace.—Suárez, *De bello,* sec. vii, no. 20.

A belligerent may do everything requisite to obtain peace and security.—Vitoria, *De iure belli,* no. 18.

Peace Conditions Imposed by Victor

The slaughter of all those whose innocence is not clearly evident for reasons of age or sex is, in general, permitted, as long as the actual combat continues; but the case will be otherwise after the cessation of combat, and the attainment of victory.—Suárez, *De bello,* sec. vii, no. 16.

The right to make war is prejudicial to others, and the punishment inflicted through war is of the severest kind; therefore, that punishment ought to be inflicted as sparingly as is possible.—*Ibid.,* no. 4.

Even assuming that the enemy's offense is a sufficient cause of war, it will not always suffice to justify the overthrow of the enemy's sovereignty and the deposition of lawful and natural princes; for these would be utterly savage and inhumane measures.—Vitoria, *De iure belli,* no. 58.

[51] For passages on the subject of liberty, see *supra,* p. 144.

When their forms of government are at variance and cannot be united, it will not be unjust for the victors to change that of the conquered to one which they believe better suited to themselves. It is right that the weaker should submit to the more powerful, when they cannot stand together. It is a natural and just rule for the weaker to obey the stronger and for the conquered to submit to what they would have imposed if they themselves had been victorious.—Gentili, *De jure belli,* Book III, chap. x.

We must first provide for a just penalty, in order that when all the roots of war have, so to say, been cut away, peace may acquire greater firmness. —*Ibid.,* chap. ii.

The measure of the punishment, then, must be proportionate to the offense, and vengeance ought to go no further.—Vitoria, *De iure belli,* no. 48.

It is just that the victor should recover the expenses of the war and compensation for the losses which he has suffered.—Gentili, *De jure belli,* Book III, chap. iii.

There is no doubt that everything captured in a just war vests in the seizor up to the amount which provides satisfaction for the things that have been wrongfully seized and which covers expenses also. This needs no proof, for that is the end and aim of war.—Vitoria, *De iure belli,* no. 50.

Complete satisfaction shall include the following conditions: all property unjustly withheld shall be restored; secondly, reimbursement must be made for all expenses due to injuries inflicted by the enemy, so that, once the war has been begun, a claim may justly be made for all its costs, to date; thirdly, something may be demanded as a penalty for the injury inflicted, for in war, regard must be had not only for commutative justice, but also for punitive justice; and finally, a demand may justly be made for whatever shall seem necessary to preserve and also to guard peace, in the future, since the chief end of war is to establish such a future peace.—Suárez, *De bello,* sec. vii, no. 5.

A prince who has obtained a just victory may do everything with the property of the enemy, provided he spare their lives, which is essential to the preservation of an undisturbed peace in the future. Therefore, if it is necessary, he may on this ground seize cities, provinces, etc. That is the doctrine supported by all, and the rational basis thereof is derived from the very purpose of an honorable war; since war is permissible especially for this

reason, namely, as a way, so to speak, to an upright peace.—*Ibid.*, sec. vii, no. 20.

After the winning of victory, a prince is allowed to inflict upon the conquered state such damage as is sufficient for a just punishment and satisfaction, and reimbursement for all losses suffered. This conclusion is commonly accepted and undoubtedly true, both because the exaction of such penalties is the object of war, and also because in a righteous judgment at law this same course of conduct is permissible.—*Ibid.*, sec. vii, no. 7.

If the victor has regard to security, then he will be satisfied when the cause of fear is removed. . . . If losses are to be made good, you should seek for nothing more, and it is maintained that in a defensive war only compensation for losses ought to be demanded and the costs.—Gentili, *De jure belli*, Book III, chap. iv.

It is also lawful, in return for a wrong received and by way of punishment, . . . to mulct the enemy of a part of his territory in proportion to the character of the wrong, or even on this ground to seize a fortress or town. This, however, must be done within due limits, as already said, and not as utterly far as our strength and armed force enable us to go in seizing and storming. And if necessity and the principle of war require the seizure of the larger part of the enemy's land, and the capture of numerous cities, they ought to be restored when the strife is adjusted and the war is over, only so much being retained as is just, in way of compensation for damages caused and expenses incurred and of vengeance for wrongs done, and with due regard for equity and humanity, seeing that punishment ought to be proportionate to the fault.—Vitoria, *De iure belli*, no. 56.

If the damages inflicted upon the guilty are sufficient for restitution and satisfaction, those damages cannot justly be extended to affect the innocent. —Suárez, *De bello*, sec. vii, no. 11.

If the enemy refuse to restore things wrongfully seized by them and the injured party can not otherwise properly recoup himself, he may do so wherever satisfaction is obtainable, whether from guilty or from innocent. . . . This is because, although the . . . [defendant] State or Sovereign might initially be blameless, yet it is a breach of duty, as St. Augustine says,[52] for them to neglect to vindicate the right against the wrongdoing of their subjects, and the injured sovereign can take satisfaction from every member and portion of their State.—Vitoria, *De iure belli*, no. 41.

[52] *Questions on Heptateuch*, Book VI, qu. x. See *supra* under the rubric "Just Causes of War."

If such a course of action is essential to complete satisfaction, it is permissible to deprive the innocent of their goods, even of their liberty. The reason is that the innocent [among the enemy] form a portion of one whole and unjust state; and on account of the crime of the whole, this part may be punished even though it does not of itself share in the fault.—Suárez, *De bello,* sec. vii, no. 12.

Even when victory has been won and redress obtained, the enemy may be made to give hostages, ships, arms, and other things, when this is genuinely necessary for keeping the enemy in his duty and preventing him from becoming dangerous again.—Vitoria, *De iure belli,* no. 18.

If the victor meets with those who are alien to humanity and to all religion, these he may most justly compel to change conduct which is contrary to nature.—Gentili, *De jure belli,* Book III, chap. xi.

To impose a tribute on conquered enemies . . .. is undoubtedly lawful, not only in order to recoup damages, but also as a punishment and by way of revenge.—Vitoria, *De iure belli,* no. 57.

The victor may also with justice impose tribute and contributions upon the vanquished.—Gentili, *De jure belli,* Book III, chap. iv.

If all the penalties . . . enumerated seem insufficient in view of the gravity of the wrong, then, after the war has been entirely ended, certain guilty individuals among the enemy may also, with justice, be put to death.—Suárez, *De bello,* sec. vii, no. 7.

But as the devastation of cities serves as a punishment, shall it also be used to strike terror into others and to glorify our name? I think not. For although all penalties are said to be designed to terrify others, rather than to check a crime which has been perpetrated; yet unless there is some fault to justify the chastisement, the punishment certainly ought not to be inflicted. . .

If cities which have been taken cannot be held, but may become hostile again and renew war, they should either be denuded of their walls or even destroyed root and branch. Naturally, one must look to the future.—Gentili, *De jure belli,* Book III, chap. vii.

The victor should grant a peace of such a kind as to be lasting, since it is the nature of peace to be permanent. . . . Therefore that victor will be

unjust who offers a peace which is no peace; that is to say, one which cannot endure, and therefore cannot be truly a peace. . . .

. . . Therefore there is but one enduring principle, namely justice, which has been preserved in punishment and should be preserved also in taking vengeance and making conditions for the future. For one who has been injured beyond his deserts will not be tranquil, but will continually desire revenge; and one who is forced to accept pitiless conditions will carry the burden only so long as he is under the necessity of obedience.—*Ibid.*, chap. xiii.

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