The higher law and divine law features of Christian accounts of political legitimacy in the West

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Given the explicit mention of ‘Christian’ in the paper topic and title, I will begin with the early Fathers of the Church and bring things to a conclusion with a few ruminations on the post-Christian West. Central to this topic is the emergence in the Christian West of doctrines of civil disobedience and illegitimacy — referring here to the illegitimacy of regimes that engage in violations of the truths embedded in higher and divine law. Of course, this means that accounts of obedience and legitimacy are the launching point. What makes rule legitimate? What makes it necessary? What guidelines are to be followed by rulers or regimes? What remedies are

available to subjects or citizens when government becomes destructive of (or undermines) the constitutive rules that brought it into being in the first instance?

Christian Political Thought: Augustine to Higher Law:

One of the greatest figures in the history of Western political thought, St. Augustine, helps to provide the framework within which all subsequent western Christian thinking is placed. Augustine insisted that Christians should learn from the ‘virtuous pagans’ and appropriate to their own use the wisdom of the past. In his case this meant drawing neo-Platonic thought into a relationship with Christian theology and Scripture. (Aristotle was not available to Augustine and the early Church Fathers.)

Plato reinforced the conviction that there were truths that were not narrowly bound by time and culture. Such verities transcended convention and offered a kind of eternal *nomos* or law. Although the neo-Platonic dimensions in Augustine's work have been overdone, it is certainly the case that Augustine forges links between the ancients and the Christians. That said, Augustine was not primarily a legal or political thinker. His concern was to lay out a doctrine of Trinitarian thinking; to display and to celebrate the beauty, truth, and grace of God; to contrast earthly kingdoms to the City of God on earthly pilgrimage, awaiting the fulfillment of all things in the end-time.

A number of scholars — myself included — have worked to 'tease out' the political implications of Augustine's work, but you will not find any systematic treatment of issues of law in his tomes. As a working bishop, dealing with all manner of dissensions and discontents, including threats to the very existence of the

young, fragile catholic Christian community, his overriding concern was the church herself and not what we now call ‘the state’. Suffice it to say that Augustine insists that the ‘life of the saints’ is social; that God has created human persons in such manner as ‘our hearts are restless ‘til they rest in thee’; and that any form of earthly rule should provide a measure of justice and should stop human beings from ‘devouring one another like fishes’. If there is a single, pithy Augustinian rule of thumb it is: *Do no harm and help whenever you can*. Should earthly kingdoms fly in the face of what is required to prevent harm to a people and to afford a measure of justice within a given polity, they are little better than robber bands. Indeed, much of the time, kingdoms are simply robber bands writ large.

Part of the story — a significant part at that — of the evaluation of earthly rule in the Christian West is that, over time, as the post-Roman Empire epochs settle down, as new forms come into being and are stabilized, and

as Christian ascendance is taken for granted, earthly dominion grows in significance and honor to Christian thinkers. Perhaps there is more to earthly rule than Augustinian minimalism. Bear in mind as we go that the shape law and dominion take in the West derives from the coming together of powerful strands that exist in tension with one another: Christian theology and Scripture, the heritage of Roman law, and the traditions of the Germanic and Frankish wandering tribes that harried the Empire in its waning centuries. To claim that this is a complicated story is to understate. These strands intertwine, merge, and part at various points but, taken together, they add up to a powerful and unique understanding of the purpose of earthly rule and law and of what makes such rule and law legitimate. Power alone does not suffice.

Let's cut into the story more or less arbitrarily in the 6th century A.D. with the systematic codification of law embodied by The *Corpus Iuris Civilis* completed under the

auspices of the Emperor Justinian in 534 A.D. (Justinian was emperor in the Eastern half of what had been the Roman Empire — the territory that came to be known as Byzantium.) To summarize briefly: Justinian's code represents what A.P. D'Entreves, in his classic work on *Natural Law: An Historical Survey*, calls the "first great achievement of natural law in the legal field … a system of laws of universal validity." (p.17) The notion was that law applied to all persons without distinction — it was a shared human inheritance. The *jus gentium*, human beings collectively and as such, was the subject of this law. Whatever particular conventional laws might emerge, all were subject to evaluation under the system of universal law. (One can see here, of course, the seeds of what became universal human rights in the twentieth century.) Law is "a knowledge of human and divine things..a theory of right and wrong." There is a "law of the State, which expresses the interest of one particular community." But there are also laws of nations and laws of nature. The law of nature always expresses, indeed corresponds

to, “that which is always good and equitable.” (p.19) Natural law doctrine assumes that humankind is in some powerful sense ‘one’ — a universal community. It follows that natural and higher law, being “based upon the common nature of men, … is truly universal.” And above all is “the sovereign Lordship of God.”(p.21) First and foremost in the doctrine of natural law is the concept of equality.

What equality is taken to mean exactly within these early formulations of natural law? To answer that question requires elaborating the anthropology, or understanding of the human person, such that human persons collectively are the subject of natural and higher law. In other words, you cannot sever theological understandings from legal and political concepts. ‘What is man that Thou art mindful of him?’ a question posed in Christian scripture. The answer is that we are God’s creatures, made in God’s image. (*imago Dei*) We are also fallen creatures, traced from the primordial sins of Adam and Eve in the

Garden of Eden. Since that fateful moment, humankind exhibits a propensity to sin that cannot be escaped. The sedimented history of humankind's accomplishments and wickedness is the common heritage of all God's children. None escapes. None can claim primordial innocence. Creatures without sin who never transgressed or blasphemed would have no need of law. They would, so to speak, naturally do what is good — their very beings would be in harmony with universal higher law. After the fall, however, we require law as aspiration and as a measure of how high we have risen or how low we have fallen. So, for the moment, let's just say that this higher law/natural law doctrine lays the basis for intense arguments concerning the relationship between natural law (*ius naturale*), the civil law (*ius civile*), and the law of nations (*ius gentium*). Roman and Stoic law and philosophy lie in the background, it should be noted, but all receive a distinctive Christian understanding and coherence.

In the Western half of the old Roman Empire, the papacy afforded a point of order and stability as the Empire disintegrated. It took centuries for new kingdoms to emerge and for their laws to be codified. In the meantime, the popes in Rome developed the early conceptions of the laws of nature as these played out in human earthly life. Central to this development is canon law — described by D'Entreves as "the principal vehicle, in the Middle Ages, of the doctrine of the law of nature." (p.33) It was obscure and often unnamed Canonists — lawyers of the Church — who gave "natural law an unprecedented coherence, clearness and force." (p.33) For the Canonists laws of nature are not only embodied in Christian Scripture but, even more forcefully, these laws can never contradict Scripture and be valid natural laws. This natural law never constituted a comprehensive doctrine of earthly rule. Rather the task was one of asking how God's creatures, rational beings, could comprehend and be faithful to universal laws that scripted the relationship of human beings to God, to

their fellow human beings, as well as to their own polities. In the first instance what natural law expresses is the dignity and innate capacity (or power) of human beings to participate in God's work here on earth, to partake (so to speak) of this higher and universal law. This law, in turn, provides "the basis of morality. This is a direct consequence of the dignity and power attributed to human nature." (p.41) D'Entreves summarizes: "Thus the possibility was opened up of giving a rational explanation and justification of ethical imperatives, as well as of all those institutions which earlier Christian thinkers had conceived as the result of sin and as its divine remedy." (p.42)

I will leave off the story of emergent natural law and its systematization at this point in order to 'plug in' another essential strand of Western Christian thinking about law, namely, theories about earthly rulers — kings — and their relationship to higher law. This strand derives from the one I have already described

but, importantly, flows as well from Germanic and Frankish understandings of kingship.

Earthly kingdoms and the duty of kings: to obey or not to obey:

One of the classic books on this subject is Fritz Kern's *Kingship and Law in the Middle Ages*. Kern's scholarship on the subject details the "deeply-rooted Germanic idea of law [as] that of good, old law, un-enacted and unwritten, residing in the common sense of justice, the sum total of all the subjective rights of individuals …." Canon law, as already noted, "regarded divine or natural law as the universally obligatory law, and insisted that it was the king's duty to realize this law in practice, even if it conflicted with the good old customary law." (p.xx) It followed that *the king was bound to and bound by law. Law limited the king's power as this law existed outside the purview of the king's own desires or will*. One can readily see that conflicts were

bound to emerge over what counted as higher or universal law, whether the king was free or unbound in certain circumstances of necessity, and over what if anything could or should be done by subjects of the king should he violate the natural or divine law as codified by the church and set down as normative for all kingdoms. Subjects played a key role in all this as it was their duty, not exclusively the king's, to "protect the existing law … it was manifestly a right and a duty to resist the king himself if he were to violate that law …."(p.xxi) This is a powerful and volatile notion. Might it not invite anarchy or the capriciousness of subjective whim? According to the doctrine this was not possible precisely because subjects themselves were bound and were not free to present just anything (say, a personal interest or desire) as law and to defy the king and disobey forthwith. King and subject are "bound together in, and to, the objective legal order: both had duties to perform to God and the Law." (p.xxi)

Because we live in an era in which human rights and even the demands of individual human subjects predominate, it is difficult for us to wrap our minds around the notion that, for our medieval forebears, the emphasis was on duty. Kings and subjects alike had duties to the objective legal order. And should the king violate that order, remedies could be taken to chastise or even remove the king. Perhaps. It was also the case that what was sometimes counseled was patience and a willingness to endure suffering, with God providing strength thus to do, until such time as the king, now become a *tyrant*, either died or repented. In other words, kings would some day cease to be kings. The very term ‘king’ isn’t merely descriptive but is normative — it embeds at its heart a concept of *legitimacy* or a right to rule. Should kings violate systematically that to which they were bound — higher and natural law — they ceased to be kings. This potentially incendiary idea culminated eventually in a *right of resistance*. In Kern’s words: “… the right of resistance against the king who violated the law was inherent in the

ancient and pre-feudal Germanic ideas, and was itself a universally recognized and well-established part of early medieval constitutional law." (p.xxii) This is a rather astonishing idea and it predates John Locke's famous 'appeal to Heaven', important for the makers of the American Revolution, by many centuries.

Kern's accomplishment in his justly famous classic is to demonstrate that both absolutist and constitutional theories of rule emerged out of the same cluster of ideas. How so? Precisely because the influences of Roman law — central to which was an absolutist *doctrine* of imperial rule — and Germanic doctrine — central to notions of limited rule — interacted in a variety of ways that contradicted one another at certain key points.

It is possible only to set forth the bare framework of the case in a single paper. Briefly, then, one theory of the divine right of

kings holds that kings embody a sacred power and are irresponsible, by which I mean they are ‘unbound’ by either God or law. They can do what they want. These notions, derived from Rome, invite *absolutism*. By contrast, Germanic political ideas and the doctrines of the Church “… combined to give expression to the divinely-willed *a priori* necessity of monarchy.” (p.5) This magistracy was bound by an objective legal order that transcended the positive law of particular entities of rule. Under this second set of understandings the king is not the head of the church; the king does not unite in his person the sacral and legal elements of authority. Both King and community are “… joined together … both are subordinate to God and to the Laws.” (p.10) Within this understanding *regnum* and *sacerdotium* (roughly state and church in our modern understanding) are separate but related in intimate ways. They may also conflict.

Church doctrine, the so-called ‘two swords theory’, held that there were two legitimate

‘swords’ (or symbols) of rule: the spiritual and the earthly. Each had its own domain. But the sword of spiritual authority was superior in dignity to that of the magistracy and, in certain exigent circumstances, the church in the office of the papacy could chastise and even remove its sanction from a particular king or ruler who violated systematically the higher and divine law. The working out of *regnum* and *sacerdotium* over the centuries sets the entire basis of western Christian rulership as plural, not monistic. That is, the respective offices of spiritual and earthly rule are not fused into a single office or person. This doctrine steers away from a full-flown theory of theocracy in favor of a more complex understanding of independent, legitimate forms of governance and their relationship: there exists not one but two, so to speak. The importance of this notion can scarcely be exaggerated for it leads directly to what in modernity we call ‘religious liberty’ and ‘constitutional rule’.

But I jump ahead of the story. Let me just note here that what became known as a full-blown ‘divine right of kings’ doctrine appears when earthly rule severed itself, in significant ways, from the authority of spiritual rule and sought to forge a doctrine of the essential irresponsibility of kings. They, the kings, are said to be entirely independent in their exercise of power — they can do pretty much what they want. This by contrast to the insistence in the classic doctrine that the ruler is “… limited in the free exercise of his princely will, and … obliged to respect legal limitations outside his own control.” (p.69)

St. Thomas Aquinas and the classic doctrine of higher law:

Let’s back up for a moment and bring the magisterial thinking of St. Thomas Aquinas into the picture. His multi-volume *Summa Contra Gentiles* is considered the very apogee of medieval thought. Indeed, so astonishing

was Aquinas' accomplishment that his writing was itself considered to be one of the miracles of the three required in order to elevate a person to sainthood! As with Augustine, his great predecessor, Aquinas is primarily a theologian and not a political theorist. But he does offer up some thoughts 'On Kingship or The Governance of Rulers' (*De Regimine Principum*).

Writing in the 13th century, and having access to Aristotle via Arabic translators, the repertoire of the thought of the ancient world available to St. Thomas is more extensive than what Augustine had to work with. With Aquinas one can readily see that earthly rule has, by the 13th century, acquired a greater dignity in the Christian West. In line with Aristotle's teleological logic, Aquinas tells us 'what is meant by a king', namely, that the rule of a king is directed to a given end. The background assumption here is that "man is by nature a political and social animal". (p.14 of *St. Thomas Aquinas on Politics and Ethics*). It

is therefore “natural for man to live in association with his fellows.” (p.14) Man possesses what Aquinas calls a ‘natural knowledge’ of what life requires. But no single person can “… arrive at the knowledge of all these things through the use of his reason. Thus it is necessary for him to live in society so that one person can help another and different men can employ their reasons in different ways …” (p.15)

Out of this intrinsic sociality flows Aquinas’ doctrine of rule. The end toward which the king is directed — his only legitimate end — is ‘the common good’, not his own ‘private good’. For Aquinas, “… private concerns divide the community, while the common good unites it.” (p.15) Rule is always, therefore, directed to the common end. A ruler is oriented to the common good as he governs others who are free and equal like himself. “If”, however, “a government is under one man who seeks his own benefit and not the good of those subject to him, the ruler is called

a tyrant. The word is derived from *tyro*, the Greek word for ‘strength’, because he uses force to oppress the people instead of justice to rule.” (p.16) Aquinas likens the king to a shepherd “… who seeks the common good of all and not his own benefit.” (p.16)

Aquinas then takes another leaf from Aristotle’s notebook in classifying types of rule or of just government. A government in tune with the higher law may take a number of forms, but the form that most likely conforms to the higher law is monarchy understood through the lens of servanthood. The King is a servant to his people. His duty is to preserve peaceful social life. In Aquinas’ words: “thus the most important responsibility of the ruler of a community is to achieve unity in peace. Just as a doctor does not debate whether to cure a sick man under his care there is no reason for a ruler to question whether he should maintain the peace of the community under him. No one should debate about the

end of action but about the appropriate means.” (p.17)

The end being given, the question — and debate — is over means to that end, and “… whatever is in accord with nature is best, for nature always operates for the best.” (p.17) It follows that a just rule by one person is the best form of government and its opposite — the tyrant — is the very worst. “The power of an unjust ruler operates to the detriment of the group because he replaces the common good of the group with his own advantage.” (p.18) Tyranny is the “most unjust form of government.” Tyrants sow discord and destroy friendship. They violate our very natures thereby. Aquinas speaks of the ‘evils of tyranny’. Now — what is a people to do should the ruler become tyrannical? Here Aquinas preaches caution … to a point. He insists that if “… the tyranny is not extreme, it is better to tolerate a mild tyranny for a time rather than to take action against it that may bring on many dangers that are worse than

tyranny itself. For it may be that those who revolt against the tyrant cannot prevail, and the tyrant then is provoked to become more extreme." (p.23) However "… if the tyrant is so extreme that it is unbearable, some have argued that it is a virtuous act for brave men to run the risk of death in order to kill a tyrant and liberate the community." (p.23. (Aquinas' reference here is surely to John of Salisbury who, in a 12th century text called *Policraticus*, insists that tyrannicide can, under certain circumstances, be legitimate — a righteous act.)

Aquinas worries about going the individual route in these matters. Private judgment may be hasty or flawed. Far better, then, for 'public authority' to take the lead in deposing a tyrant. For if a community has a right to appoint a ruler it surely has a right, through what we might call channels of authority, to depose him. Aquinas isn't very specific on the precise form this public authority may take but he clearly fears the dangers of an individualistic

rush to kill a tyrant. If there is no human recourse against the tyrant, "… recourse is to be made to God, the king of all, who is the help of those in tribulation." (p.25) Here we can see a foreshadowing of what later became the 'right to revolution'.

Let's now take the measure, in brief, of Aquinas on the law. Law is the ruler and measure of action. The "… first and foremost purpose [of all law is] the ordering of the common good. To order something to the common good is the responsibility of the whole people, or of someone who represents the whole people." (p.45) The good of one is not the common good. Although the head of a household helps to order a group of persons, this cannot be said to "have the character of law." (p.45) For law is "… nothing else than an ordination of reason for the common good promulgated by the one who is in charge of the community." (p.46)

Aquinas then moves to parse the kinds of law that interact with one another. There is first eternal law that is not subject to the vagaries of time. Eternal law refers to the "… rational ordering of everything on the part of God, as the ruler of the universe" and this "has the quality of law." Second is the 'natural law' in which all persons participate. Natural law is the participation in eternal law by God's rational creatures. Third comes human law, the articulation of "… particular dispositions arrived at by reason …" (p.46) Aquinas then complicates matters further by discussing the need for divine law to direct human life. One needs divine law because, as guided by natural, human, and eternal law, natural reason is insufficient. Human beings are destined, finally, to eternal bliss and this is set forth in divine law. Very importantly, Aquinas insists that God alone is the judge of human hearts and inner motivation. The judgments of law can *only apply to external actions* lest *law-givers* assume they are god-like.

It is worth spending some time with Aquinas here because what he offers is very important to understandings of how far the law reaches — whether it can legitimately be extended into certain areas or not, how one understands whether it complies with natural law and so on. Suffice to say for Aquinas, as for Augustine, the law cannot eliminate or prohibit "… every evil action, because in trying to eliminate evils, it may also do away with many good things and the interest of the common good which is necessary for human society may be adversely affected." (p.47) Tyrannical 'law' is not properly law at all because it is not in accord with reason and not directed to the common good. If law is unjust it is an act of violence.

Right reason is itself derived from the eternal law and the related natural law is a kind of practical reason, a way in practice to adhere to law. Some propositions are self-evident and others are not. "Man is a rational being", Aquinas tells us, "is by its nature self-evident

since when we say ‘man’ we are also saying ‘rational’, but for someone who does not know what a man is, this is not a self-evident proposition.” (p.49) Human beings cannot place themselves in contradiction — cannot coherently affirm and deny first principles at the same time. Law is either ordered to the good or it is not and, if not, it isn’t properly law at all. Law may be unjust in two ways: “[F]irst if it is contrary to human good … Secondly, … because it is contrary to divine goodness ….’We must obey God rather then men.’ And we are obliged to disobey a law that violates God’s law.” (p.55)

Matters get quite complicated at this juncture. Yes, Aquinas tells us, truth is the same for everyone. Truth is not capricious. But truth is not “… equally known by everyone. It is universally true, for instance, that the three angles of a triangle are equal to two right angles but not everyone knows this.” (p.50) It is “… right and true for everyone to act according to reason …” but not all are ordered

to reason in the same way. The natural law "… is the same for all, both as a standard of right action and as to the possibility that it can be known." (p.51)

We know from Scripture that God commanded things contrary to natural law — but only God can thus order. In the human order of things, natural law is somewhat flexible. It can be added to as more provisions 'useful to human life' come to light. Too, some elements may be detracted from natural law, being determined through reason not to conform to it any longer. But as to first principles "… the natural law is altogether unchangeable." (p.51) There is both flexibility and fixity.

Of great importance to future legal thinking and understanding of the use of force, Aquinas insists that it is never legitimate to make war to force people to believe — never. Faith must be a matter of free will. (p.61) However, those

who are within the faith who fall into heresy and apostasy can be chastised and prevented from interfering with the Church and with the faith of others. This is a task the Church may undertake by imposing a sentence of excommunication.

Suppose there are unbelievers (here Aquinas includes those who profess a non-Christian creed) within a body politic. Aquinas argues that their "… rites may be tolerated either because a greater good may come of it or some evil may be avoided." (p.62) Aquinas tells us that the rites of unbelievers may have some truth in them. Now there may be some rites that lack truth altogether and sow discord and create scandal and these are not to be tolerated. Finally, it is *never* permitted to take children away from Jewish or other unbelieving parents and baptize them against their will — never. Aquinas is clear: "Therefore it is against natural justice for a child to be taken from the care of his parents before he has the use or reason or for something to be decided about

him against the will of his parents.” (p.63) The natural family conforms to natural law and it is a violation of natural justice to remove a child from his or her parents or act against their will.

This brief discussion should make very clear why the Thomistic legacy figures so importantly in all subsequent discussions of law in the Christian West. Although figures like John Locke did not credit Aquinas (being anti- or non-Catholic), they studied in the Scholastic tradition and were infused with a heavy dose of the Thomistic legacy. The American founders, as I noted above, in referencing Locke were paying tribute to St. Thomas at the same time.

What happened post-Aquinas?

The great Reformers either positioned themselves against the medieval legacy, most importantly Aquinas — as in the case of

Luther — or built on that legacy — as in the case of Calvin. The single most salient point to make is that no one — no figure of any significance — believed that it was possible to sever law from morality. Natural law pertained as a significant concept well into early modernity. As I already noted, it was honored by John Locke. But it was also vehemently rejected by Thomas Hobbes. In the tradition of so-called nominalism, Hobbes represented a strand of thought that challenged notions of an objective legal order and higher *natural* law that believed the ruler was outside the law, not bound by it and to it, and that thereby closed the space for public resistance to tyrants. This strand of thinking eventually ushered in the so-called 'law as command' theory, namely, the claim that law is simply the command of the ruler, dress it up as you will. So far have we gone down that direction, softened to become something like 'law is what representatives of the majority decide', that, during the confirmation hearings for Supreme Court Justice Clarence Thomas, one important Harvard law professor opined in the *New York*

Times that Thomas should not be confirmed because he believed in that ridiculous notion of natural law which runs counter to the American tradition.

Ignorant as to history and tendentious as to legal thought, such views have acquired considerable momentum in our era of post-modernism. For post-modernists everything is permitted that you can get away with, more or less. There is no objective legal order. There is no higher law. God is out of the picture. Power is everything. One sees a dangerous ‘triumph of the will’ in certain arenas of thought. In post-Christian western Europe, the powerful ideas I have here briefly sketched are discredited, forgotten, no longer taught save at certain church-oriented schools and some departments of philosophy that haven’t given themselves over entirely to post-modern trends or to a retreat into logic. The Catholic Church at present is the primary carrier of this great tradition, Protestant Christianity having largely abandoned it — so far as I can tell — in favor

of very politicized understandings of human rights. But the forgetting of a great and powerful legacy in the Christian — now post-Christian (save for the United States) — West is another story for another time.