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Charles P. Nemeth, J.D., Ph.D., LL.M.

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LAWYERS AND ADVOCATES IN THE JURISPRUDENCE OF ST. THOMAS AQUINAS†

CHARLES P. NEMETH, J.D., PH.D., LL.M.*

INTRODUCTION

Truth is central to any lawyer's vocation. Legal advocates are cautioned that falsehoods are not only destructive to the justice system, but also to the soul. Acceptable legal advocacy can be tenacious, innovative, and creative, but not at the expense of justice and truth. Falsehoods of every sort are vociferously condemned by St. Thomas Aquinas. Lawyers are not to be a party to any unjust law, for to advocate the merits of an unjust law is to advance injustice. Unjust laws bind neither lawyer nor client.

At trial or other legal proceedings, the lawyer needs to refrain from all falsehoods, suspicion, rumor, calumny, collusion and evasion. Those who engage in such tactics should be barred from the practice of law. If he or she is meritorious and factually grounded, Thomas insists that the lawyer aggressively pursue defense and prosecution using the wits given to him by God. These general insights extend to witnesses, the presentation of

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* Professor of Criminal Justice, the State University of New York at Brockport; Member of the Pennsylvania, New York, and North Carolina Bars.

evidence, and candor toward the tribunal. In sum, Thomas's portrait of a lawyer contains professional competencies, but more compellingly, a picture of the moral agent dedicated to virtue and truth.

I. THE LAWYER IN THOMISTIC JURISPRUDENCE

Lawyers do not escape Thomistic scrutiny, and are a topic of enormous importance in the legal theory of Thomas. Just as human law is necessary, laudatory, and foundational to civilization, so too is the lawyer who interprets, advocates, or challenges the legitimacy of any law. Lawyers specialize in the law as an instrument, in procedural and substantive legal settings. Employing the law as promulgation or act is only the starting point. Law, aside from being a juridical act, is by its proper nature, an ordination of reason and the subject of virtuous conduct. The foremost of such conduct is the virtue of justice itself. Lawyers clamoring for justice do so in a holistic sense, rather than upon the urging of individual clients. Lawyers, when carrying out their tasks correctly, remember the comprehensive definition Thomas attributes to law, which is avoiding individual preference, and retaining a rational prescription for the whole, for the good, for the universe. Thomas perceives the practice of law in both secular and spiritual terms. When deciding whether or not a lawyer should take or charge a fee for his or her advocacy, Thomas states, "[t]hough knowledge of law is something spiritual, the use of that knowledge is accomplished by the work of the body: hence it is lawful to take money in payment of that use, else no craftsman would be allowed to make profit by his art."¹

In this framework, lawyering is more than a series of mechanical steps, it is a spiritual undertaking, entwined and

¹ ST. THOMAS AQUINAS, THE SUMMA THEOLOGICA II-II, Q. 71, Art. 4, at 1499 (Fathers of the English Dominican Province trans., 1947). *Quod etsi scientia juris sit quoddam spirituale, tamen usus ejus fit opere corporali; et ideo pro ejus recompensatione licet pecuniam accipere; alioquin nulli artifici liceret de arte sua lucrari.* As J.V. Dolan points out, lawyers and their laws are meaningful when the law retains "a certain universality and remain[s] at some distance from the contingent singulars. It cannot become so completely configured to any individual action as to destroy its usefulness as a measure for the others." J. V. Dolan, *Natural Law and Judicial Function*, 16 LAVAL THEOLOGIQUE ET PHILOSOPHIQUE 96 (1960).

entangled in the mesh of man's intellect, reason, ends, goals, natural law imprints, and the image of God's creation. Spouting off legal maxims and principles while being slavishly attendant to legal promulgations without the broader perspective offered by Thomas is not the practice of law in the truest sense. The practice of law, and lawyering itself, is a sojourn into the just and unjust world of human existence.² Good lawyers use the cerebral skills of an intelligent being, and are mindful of their spiritual and rational makeup. Certainly, the truly proficient lawyer develops superlative analytical talents, becomes a sterling orator, excels in the tactics and techniques of the litigator, and aggressively pursues the client's victory or position; though these competencies only partially encompass the Thomistic lawyer.

More germane for Thomas is the permanent remembrance of the hierarchical structure of law, descending down from the Divine Exemplar, inherent and burned into our natural beings, aided by divine revelation, and dependent upon the order that emanates from nature and the positive laws enacted for the common good. Lawyers, like every human agent, are subject to this plan and need to submit their person and occupation to this teleological approach. The state cannot neglect the purposes and effects of the natural law since the natural law is given us "by the mercy and wisdom of the truly Supreme Legislator."³

Lawyers, in Thomas's eyes, are more than dockyard bullies who, if screaming loud enough, antagonizing opponents and representing clients zealously enough, are aggressive victors. In the contemporary courtroom, the search for truth is often replaced and unfortunately vanquished by those whose message rests on drama more than truth. Form over substance, fair over right are catch phrases that replace the true and the good in law and in lawyering. A client's rights or protections, just as a lawyer's vocation, are not singularly grounded in the promulgative reality, but in a law "that ought to be."⁴ The lawyer's "role" is, at best, an amoral functionary, and Thomas

² For an interesting analysis of lawyering being more than mere practice, see generally Louis M. Brown & Thomas L. Shaffer, *Toward a Jurisprudence for the Law Office*, 17 AM. J. JURIS. 125 (1972).

³ Igor Grazin, *Natural Law as a Form of Legal Studies*, 37 AM. J. JURIS. 1, 16 (1992).

⁴ J.V. Dolan, *Natural Law & Modern Jurisprudence*, 16 LAVAL THEOLOGIQUE ET PHILOSOPHIQUE 44 (1990).

insists on much more.

To the dismay of our present justice system, modern legal practice repeatedly witnesses lawyers who advocate claims knowing of their falsity; represent cases thoroughly vacant in merit; adopt litigation strategies that wear down opponents by exhausting their resources; and orally argue *avant garde*, even bizarre, legal arguments. And why not? For most contemporary legal professionals, lawyering is about gamesmanship, tactics, and victory for client and cause, with little care for the means utilized.

Modern law schools speak of ethics in regulatory provisions or case law determinations, not in the Thomistic ideal of truth, teleology and justice. Justice is about what is *right*. Justice concerns itself solely with right reason, virtue, human and communal goods. Justice is not primarily about results tabulated in a win-loss column. Lawyers, for Thomas, are in the business of truth, not in a war of combatants or deceptive theatrical performances. Thomas's comparison of a soldier to a legal practitioner is instructive. A soldier in the midst of battle may be deceptive but similar tactics by a lawyer/advocate are rejected:

As stated above . . . it is lawful for a soldier, or a general to lay ambushes in a just war, by prudently concealing what he has a mind to do, but not by means of fraudulent falsehoods, since we should keep faith even with a foe, as Tully says (*De Offic.* iii. 29). Hence it is lawful for an advocate, in defending his case, prudently to conceal whatever might hinder its happy issue, but it is unlawful for him to employ any kind of falsehood.⁵

This sketch of the lawyer/advocate is consistent with Thomas's overall view of human operations, inclinations and dispositions. Lawyers are no different from other actors on the world stage.

This generality, however, does not cause Thomas to hesitate in laying out a blueprint for the legal profession. Eruditely,

⁵ AQUINAS, *supra* note 1, Q. 71, Art. 3, at 1499. *Quod, sicut supra dictum est, militi vel duci exercitus licet in bello justo ex insidiis agere, ea quae facere debet prudenter occultando, non autem falsitatem fraudulententer faciendo, quia etiam hosti fidem servare oportet, sicut Tullius dicit (in De offic. lib. I, in tit. De bellicis offic. a med. et De fortitud. lib. III, circ. med.) Unde et advocato defendenti causam justam licet prudenter occultare ea quibus impediri posset processus ejus; non autem licet ei aliqua falsitate uti.*

Thomas addresses the practice of law from various vantage-points. Exactly how does a lawyer morally and ethically advocate? How does truth serve as an ethical guidepost for the lawyer? Does the virtue of justice guide the lawyer? Do acts of injustice eventually transform the just lawyer into an unjust person? Is there a relationship between injustice, falsehood, immorality, and the condition of a lawyer's soul, or are these injustices merely manifestations of a profession and not the lawyer's own personhood? Is there a difference in professional and ethical parameters for those representing defendants or plaintiffs? How effective are lawyers in meting out justice by giving what is due to others and equalizing the imbalances that are inherent in civil harms and criminal wrongs? Not surprisingly, Thomas's job description for "lawyer" comprises more than professional obligations and proficiencies, it also includes a rich formula for the good life, since truth is annexed to justice.⁶

II. THE LAWYER AS ADVOCATE

Delivering a legal argument, arguing for or against a particular law, precedent, or statute, urging the adoption of a specific principle in law or equity are the sum and substance of the advocate. Lawyers perform a myriad of functions, which throughout their professional careers will most assuredly include legal argument. It is the business of the advocate to vigorously represent a case or a client in their respective conditions and circumstances. Vigor of representation however, is not a license to act without moral parameters. "*Zealous representation*," a "*vigorous defense*," "*unfailing loyalty to client and case*," and being "*a hired gun*" for the defense or prosecution, are the standard "shop" descriptions for the lawyer/advocate. These depictions primarily portray a role of touting or towing the line or case argument within advocacy. Such bantering is an incomplete inquiry into the nature of advocacy since the advocate need delve into other underlying issues: 1) *the meritorious basis for claim or charge* and, 2) *the justness and justice in the claim or charge*. In other words, the advocate, before tuning up the vocal chords, assesses the morality, the virtue and the end result of the case to

⁶ See *id.* Q. 80, Art. 1, at 1527.

be advocated.

Lawyers, in Thomas's moral setting, cringe at false factual averments and avoid any type of deliberate or selective ignorance of facts. Lawyers are in the business of justice, and Thomistic justice is not the province of victories and legal scorecards. Adopting a tone of condemnation, Thomas chides the lawyer who advocates the "*unjust cause*."⁷ "It is unlawful to co-operate in an evil deed, by counseling, helping, or in any way consenting, because to counsel or assist an action is, in a way, to do it. . . ."⁸

Imagine this view in the modern-day courtroom, where lawyers stand lockstep with criminals known to be guilty or with litigants whose cases are disingenuous at best. Shrouding oneself in a cloak of ignorance about client and case is unacceptable for those attuned to Thomas's jurisprudence. Thomas's legal advocate is aggressive about both his profession and those represented, as symbolized by his characterization of those advocating an unjust cause as "ungodly."⁹ The *ungodly* operate by means of chicanery, "fraudulent falsehoods,"¹⁰ and by engaging in a perversion of "his art for an evil end."¹¹ George Friel interprets Thomas correctly:

If in the course of a suit, the advocate finds that his case is unjust, he must give up the case, or induce his client to give way, or make some compromise without prejudice to the other side. In the course of a suit he may make use of all prudent and honest means, e.g., by not revealing all the truth, etc. On the other hand, he may never commit a crime to save his client. In criminal cases he may defend the criminal always, provided that he uses neither fraudulency nor lies.¹²

For those laboring in the muck of institutionalized legal practice, a policy of honesty and disclosure appears both naive and incomprehensible. For many, the legal system has institutionalized, and thereby legitimized, a selectively disclosed

⁷ *Id.* Q. 71, Art. 3, at 1498 (emphasis added).

⁸ *Id.* *Quod illicitum est alicui cooperari ad malum faciendum, sive consulendo, sive adjuvando, sive qualitercumque consentiendo, quia consilians et coadjuvans quodammodo est faciens.*

⁹ *Id.* Q. 71, Art. 3, at 1499.

¹⁰ *Id.*

¹¹ *Id.*

¹² GEORGE QUENTIN FRIEL, PUNISHMENT IN THE PHILOSOPHY OF SAINT THOMAS AQUINAS AND AMONG SOME PRIMITIVE PEOPLES 138 (1939).

type of legal advocacy. It is a business not interested in putting all the cards on the table, but instead hiding behind a lax occupational positivism. Cases and claims docketed in the prothonotary's office, rarely press the advocate's conscience. For the most part, today's attorneys are not mindful of the moral or metaphysical connotations of law, as is the justice system itself. The consequences of a legal culture and infrastructure dominated by the positivist's ideal is far-reaching and has invaded law school classrooms and courtrooms.¹³ A lawyer's model gutted of moral demands entices the bulk of advocates. Why should the advocate care when legal pundits creatively cook-up new and untested theories of injury and defense? Who can resist criminal defenses of the sort invented in the last three decades, e.g., *television addiction*, *post-partum blues*, *junk food compulsions*, *astrological imbalances* and *sexual addiction*? Advocacy without moral consequences is nothing more than a mindless series of movements and rationalizations. Thomas recoils at this narrow view of lawyering since a lawyer's function must be "seen in its full light, must be seen against the background of his teleological conception of man and the universe . . . to the rule or domain of that higher law that leads all things to their final end or goal."¹⁴

An unjust law is really not a law in the truest sense, and therefore not obligatory. To advocate an unjust cause likewise is contrary to justice itself, to the very idea of law as an ordination. "[L]aw is binding in conscience only if it is law in the truest or most essential sense, and, it is binding in conscience if it is law in the essential sense because the essence or nature of law is intimately bound up with justice."¹⁵ For Thomas's part, the unjust advocate is an accomplice who sins so grievously that he or she is "bound to restitution of the loss unjustly incurred by the other party by reason of the assistance he has provided."¹⁶ Honesty toward and in the tribunal, a moral basis for case and cause, and a rejection of unmeritorious cases, in these times seems almost surreal. Gilson's remarks would fall on deaf ears in today's legal community. "But a lawyer lacking morality

¹³ Dolan, *supra* note 4, at 44.

¹⁴ Robert J. Kreyche, *Virtue and Law in Aquinas: Some Modern Implications*, 15 SW. J. PHIL. 113 (1974).

¹⁵ Edward J. Damich, *The Essence of Law According to Thomas Aquinas*, 30 AM. J. JURIS. 79, 81 (1985).

¹⁶ AQUINAS, *supra* note 1, Q. 71, Art. 3, at 1499.

ought to be even more unthinkable, because no lawyer is allowed to plead an unjust cause. If he does so in error and good faith, he commits no fault. But if he knows that the cause he is defending is unjust, he gravely offends against justice."¹⁷

The positivist attorney has only the cause, good or bad, to hold onto. Lawyers need more than the artificiality and insubstantiality of promulgation and enactment.¹⁸

A just lawyer acts compatibly with reason, operates in conformity with the natural law, strives for the life of virtue and perpetually seeks the perfect good of all existence. These ingredients for the good and happy man are applicable to the good and happy lawyer.¹⁹

To the advocate, then, is the heady responsibility of advocating in conformity with this plan, advocating not as an automaton, but as a moral agent. Thomas labels this power unique to rational creatures alone since the "rational creature holds dominion over his acts, moving himself freely in order to perform his actions."²⁰ Only then will the advocacy bring about what is due, what is right, assuring a "certain rectitude . . . an equality between things and persons."²¹

Thomas is realistic enough to forgive or excuse the advocate who has been misled. As any lawyer discovers, a client's word is often an abridged or slanted storyline. The correctional population of America, numbering in the millions, is uniformly innocent, the inmates declare. While blind acceptance of a client's vision of truth is unwise, Thomas withholds judgment from those advocating a claim in good faith. This lack of knowledge, or the client's delivery of inaccurate knowledge, may be the foundation upon which the advocate develops a case theory. Thomas excuses this to some extent: "If, however, he defends an unjust cause unknowingly, thinking it just, he is to be

¹⁷ ETIENNE GILSON, *THE CHRISTIAN PHILOSOPHY OF ST. THOMAS AQUINAS* 320 (L.K. Shook trans., 1956).

¹⁸ For a persuasive discussion of how legal activity inevitably depends upon moral certitude, see generally Henry Mather, *Natural Law and Right Answers*, 38 *AM. J. JURIS.* 297 (1993).

¹⁹ See James V. Schall, S.J., *The Natural Law Bibliography*, 40 *AM. J. JURIS.* 157, 160 (1995).

²⁰ THOMAS AQUINAS, *SUMMA CONTRA GENTILES* Book III, part II, Chap. 111, 1 (Vernon J. Bourke trans., 1975).

²¹ E. T. Gelinas, *Right and Law in Thomas Aquinas*, in *MYTH AND PHILOSOPHY* 131 (George F. McLean ed., 1971).

excused according to the measure in which ignorance is excusable.”²²

This toleration melts away when and if the advocate determines that the theory of his advocacy is fraudulent or false. Continued advocacy in the fraudulent cause is inexcusable and is assuredly a systematic attack against “commutative justice, legal justice, or at least against truth.”²³

Thomas recognizes that discovery of client/case falsehood exacts a series of dilemmas on the practitioner and cautions the advocate against the radical implications of immediate withdrawal from representation. He also reinforces the need for continued discretion in matters of privilege and confidentiality. The advocate need not help the opposition even though the basis of the advocacy has been altered by subsequent discovery of its injustice. Thomas shows keen sensitivity to the due process implications of withdrawn or substitute counsel: “[H]e ought not to throw up his brief in such a way as to help the other side, or so as to reveal the secrets of his client to the other party. But he can and must give up the case, or induce his client to give way, or make some compromise without prejudice to the opposing party.”²⁴

As an officer of the court, the advocate, as described in current parlance, should not advocate a case lacking in merit,²⁵ nor that which is injurious to the profession as a whole. Thomas’s benchmark for the just or unjust cause certainly assures both the quality and integrity of both case and advocate.

III. THE LAWYER, TRUTH, AND FALSEHOOD

Because justice is concerned with the right and “expression of right,”²⁶ it is defined in terms of what is due, what is in balance and in equilibrium, and is an expression and reflection of the

²² AQUINAS, *supra* note 1, Q. 71, Art. 3, at 1499. *Si autem ignoranter injustam causam defendit, putans esse justam, excusatur secundum modum quo ignorantia excusari potest.*

²³ Michael Harding, *True Justice in Courts of Law*, in AQUINAS, *supra* note 1, at 3356.

²⁴ AQUINAS, *supra* note 1, Q. 71, Art. 3, at 1499. *Non debet eam prodere, ut scilicet aliam partem juvet, vel secreta suae causae alteri parti revelet. Potest tamen et debet causam deserere, vel eum cujus causam agit, ad cedendum inducere, sive ad componendum sine adversarii damno.*

²⁵ See MODEL RULES OF PROF’L CONDUCT Rule 3.1 (1999).

²⁶ AQUINAS, *supra* note 1, Q. 57, Art. 1, at 1432.

virtuous ordination of the human person. This emanates from the Creator, impressing itself in the form of primary and secondary principles of the natural law with truth at its core. For the lawyer, truth is fittingly attributed to every aspect of law and its practice. At various places in the *Summa Theologica*, Thomas treats the opposite of truth-telling, dwelling upon: falsehood, cheating in buying and selling,²⁷ wilful deceit in the transfer of goods and services,²⁸ overstatement and unconscionability in the value of a thing,²⁹ violation of vows,³⁰ oaths,³¹ perjury,³² and lying.³³ Thomas states that lying and falsehood are opposed to truth, except in accidental cases. Lying, "*mendacium*," is neither the product of negligence or involuntariness, but a formal declaration of falsity in "opposition to the *mind*"³⁴ (*contra mentem*). A lie is contrary to charity when it is in confrontation with justice and an inequity.³⁵ Dissimulation and hypocrisy are also vigorously condemned by Thomas. Words, which are the sum and substance of lies and falsehoods, represent one of many means to falsehood. Signs, acts, and deeds that are disingenuous encompass falsity:

Accordingly just as it is contrary to truth to signify by words something different from that which is in one's mind, so also is it contrary to truth to employ signs of deeds or things to signify the contrary of what is in oneself, and this is what is properly denoted by dissimulation. Consequently dissimulation is properly a lie told by the signs of outward deeds. Now it matters not whether one lie in word or in any other way, as stated above. Wherefore, since every lie is a sin, as stated above, it follows that also all dissimulation is a sin.³⁶

²⁷ See *id.* Q. 77.

²⁸ See *id.* Q. 77, Art. 3, at 1515.

²⁹ See *id.* Q. 77, Art. 4, at 1516.

³⁰ See *id.* Q. 88, Art. 6, at 1517.

³¹ See *id.* Q. 89.

³² See *id.* Q. 98.

³³ See *id.* Q. 110.

³⁴ *Id.* Q. 110, Art. 1, at 1664.

³⁵ See *id.* Q. 110, Art. 4, at 1668.

³⁶ *Id.* Q. 111, Art. 1, at 1669. *Ita etiam opponitur veritati quod aliquis per aliqua signa factorum vel rerum aliquid significet contrarium ejus quod in eo est, quod proprie simulatio dicitur. Unde simulatio proprie est mendacium quoddam in exteriorum signis factorum consistens. Non refert autem utrum aliquis mentiatur verbo, vel quocumque alio facto, ut supra habitum est. Unde*

Thomas's legal system depends on hard evidence, not suspicion, rumor, and doubt.³⁷ Suspicion, for example, is nothing more than a "perversity of the affections"³⁸ that cannot lead to the type of legal truth necessary for acquittal or conviction. Dubious ideas should not control legal reasoning because lawyers "strive to make [judgments in] accord with things as they are."³⁹ Truth has a hardness to it, be it the truth of temporality or universality. Falsehood, deceit, and deception have no place in Thomas's legal system, nor in his profile of the legal professional. Falsehood implies an internal secrecy that is corrosive and corruptive to both lawyers and individuals because "[s]ecrecy is sometimes a cause of sin."⁴⁰ Falsehood in accusation, in any form, *calumny*, *collusion*, and *evasion*, is just as difficult for Thomas to tolerate, for each of the guiles "deceitfully hides"⁴¹ the truth. Thomas actually screens candidates for admission into legal practice by assessing the candidate's character in relation to truth or falsity. Personal defects of the soul should be a basis for exclusion from the legal profession. Those already in the profession will be "debarred"⁴² if found dishonest. "[P]ersons of ill repute, unbelievers, and those who have been convicted of grievous crimes"⁴³ are *unbecoming*⁴⁴ candidates for the lawyerly arts. Thomas's lawyer represents the completely virtuous person who possesses the functional skills necessary to advocate legal claims and "those who are defective in these points, are altogether debarred from being advocates either in their own or in another's cause."⁴⁵ Thomas identifies various strategies of plaintiff and defense litigation, of diverse approaches in the delivery of witness testimony, and of the means adopted to save one's life or freedom, all of which are falsehoods that he labels as "sins committed against justice."⁴⁶ In each of these contexts,

cum omne mendacium sit peccatum, ut supra dictum est, consequens est etiam quod omnis simulatio est peccatum.

³⁷ See *id.* Q. 60, Art. 3, at 1448.

³⁸ *Id.*

³⁹ *Id.* Art. 4, at 1449.

⁴⁰ *Id.* Q. 66, Art. 3, at 1478.

⁴¹ *Id.* Q. 68, Art. 3, at 1488.

⁴² *Id.* Q. 71, Art. 2, at 1497.

⁴³ *Id.* at 1498.

⁴⁴ See *id.*

⁴⁵ *Id.* *Qui in his defectum patiuntur, omnino prohibentur ne sint advocati nec pro se, nec pro aliis.*

⁴⁶ *Id.* Q. 69.

truth is the standard bearer and falsehood is scathingly critiqued.

A. *Defense Counsel and Defendants*

Lawyers confront the horrid landscape of falsehoods more in criminal defense work than in any other area in the legal process. In criminal cases, defendants are often on the block for fines, incarceration, restitution, or other restriction. Counsel is hired or assigned, as Gilson points out, to “defend them as skillfully as he can, never resorting to falsehoods but allowing himself those ruses and reservations necessary for the triumph of justice.”⁴⁷ Intentional falsehoods are never tolerated by Thomas, but a masterful defense is integral to the aims of justice. As a defendant, Thomas ascribes no quality of falsehood in silence, in a refusal to incriminate oneself, and in a defense strategy that employs “lawful means, and such as are adapted to the end in view, which belongs to prudence,”⁴⁸ nor to give testimony on questions the defendant has no obligations to answer. “St. Thomas wisely concludes that a good defendant, while he may prudently hide impeding evidence, should not resort to falsehood.”⁴⁹ Lawyers advising caution in defense testimony, a lack of cooperation regarding a confession, or a lawful non-delivery of incriminating evidence are not engaged in falsehood. Instead, Thomas perceives this conduct as “praiseworthy,”⁵⁰ for the defense is not based upon “calumnies”⁵¹ but upon prudence. Western legal tradition culminating in the constitutionalism of the American colonies, specifically at the Fifth Amendment’s prohibition on self-incrimination, rests side by side with Thomistic legal theory.

On the other hand, the line to aggressive defense can transform into patent falsehood—a situation never pleasing to Thomas. “But it is unlawful for him, either to utter a falsehood, or to withhold a truth that he is bound to avow, or to employ guile or fraud, because fraud and guile have the force of a lie, and

⁴⁷ GILSON, *supra* note 17, at 320.

⁴⁸ AQUINAS, *supra* note 1, Q. 69, Art. 2, at 1490.

⁴⁹ E. K. RAND, *CICERO IN THE COURTROOM OF ST. THOMAS AQUINAS* 48–49 (1946) (describing the tenets of Cicero that Thomas used in his court).

⁵⁰ AQUINAS, *supra* note 1, Q. 69, Art. 2, at 1490.

⁵¹ *Id.* (stating that since one should not defend with calumnies, the allegations should also be made without calumnies).

so to use them would be to defend oneself with calumnies.”⁵²

The terminal nature of the death penalty would lead most to the conclusion that the lie would be an exception to Thomas’s resistance to falsehood. Even here, Thomas does not tolerate the falsehood to save the bodily flesh, but condemns that body to death in order to assure the salvation of the soul. It is justice’s reciprocity that can only come to fruition upon execution, and to prevent its imposition in a defense tactic achieves the status of a “sin.” God ordains “the punishment of evil-doers”⁵³ (*in quo est divinitus instituta ad vindictam malefactorum*). The man at the gallows cannot fight, lie, or defend himself with calumny or other deception. Lies and falsehoods cause injury to the judicial process according to Thomas:

To lie, with injury to another person, in order to rescue a man from death is not a purely officious lie, for it has an admixture of the pernicious lie: and when a man lies in court in order to exculpate himself, he does an injury to one whom he is bound to obey, since he refuses him his due, namely an avowal of the truth.⁵⁴

Using the judicial process to every advantage is not a falsehood in any sense. Lawyers’ conduct as advocates is typically constrained by the rules of civil and criminal procedure, evidence, and the appellate process. These types of rules set forth professional parameters. To argue within them in the most vigorous of styles would not be surreptitious, but prudential. At one locus in the *Summa Theologica*, Thomas refers to appeals from judgments. At issue is whether this type of juridical process is, or has the potential to be, filed from false motives. Surely, if an appeal is filed for purposes of delay and contentiousness, the appeal merely compounds injustice. But if filed for a legitimate cause, the appeal is characterized by Thomas as a “prudent

⁵² *Id.* Q. 69, Art. 2, at 1491. *Non autem licet ei vel falsitatem dicere, vel veritatem tacere quam confiteri tenetur, neque etiam aliquem dolum vel fraudem adhibere, quia fraus et dolus vim mendacii habent; et hoc est calumniose se defendere.*

⁵³ *Id.* Art. 4, at 1492, *sed contra*.

⁵⁴ *Id.* Art. 2, at 1490. *Quod mentiri, ad liberandum aliquem a morte cum injuria alterius, non est mendacium simpliciter officiosum, sed habet aliquid de pernicioso admixtum. Cum autem aliquis mentitur in judicio ad excusationem sui, injuriam facit ei cui obedire tenetur, dum ipsi denegat quod ei debet, scilicet confessionem veritatis.*

means of escape."⁵⁵ The lawfulness of the process, whether appeal or otherwise, is imputed in the motive. Appeals also serve as a potential remedy or bulwark against unjust oppression or arbitrary decision-making.⁵⁶

In the final analysis, the fraudulent will reap the fruits of their deception and simultaneously deliver an injustice to the client and the justice system as a whole. Thomas dramatically conveys that "[t]hose who commit frauds, do not design anything against themselves or their own souls; it is through God's just judgment that what they plot against others, recoils on themselves, according to Ps. vii. 16, *He is fallen into the hole he made.*"⁵⁷

B. Counsel and Witnesses

The delivery of testimony by witnesses is another critical junction for lawyers advocating cases. Witnesses, while independent of counsel, are closely tied to the advice of counsel, and intently listen to their commands and exhortations. Litigation manuals and advocacy treatises spend considerable time examining the role, function, and scope of witness testimony and how lawyers lead in its preparation.⁵⁸ That preparation will consist of a factual review, determining the breadth and depth of testimonial subject matter, tactics for fielding the onslaught of direct or cross-examination, and generic suggestions on truth-telling and obligations to the court. Universally evident in the witness-lawyer relationship is a witness's deep dependence upon the instruction of counsel and the need for advice on how to proceed testimonially. For this reason, the deception perpetrated by a witness can possibly be imputed to counsel's preparation. At a minimum, a deceptive witness should be ferreted out by counsel since candor before the tribunal is mandatory.

Thomas understands the interplay between lawyer and

⁵⁵ *Id.* Art. 3, at 1491 (stating that a man should submit to a lower authority only where the lower authority does not depart from the order of the higher).

⁵⁶ *See id.*

⁵⁷ *Id.* Q. 55, Art. 5, at 1424. *Quod illi qui fraudes faciunt, ex eorum intentione non moliuntur aliquid contra seipsos, vel contra animas suas: sed ex justo Dei iudicio provenit ut id quod contra alios moliuntur, contra eos retorqueatur, secundum illud (Psalm. VII, 16): Incidit in foveam quam fecit.*

⁵⁸ *See generally* CHARLES P. NEMETH, *LITIGATION, PLEADINGS AND ARBITRATION* (2d ed. 1997); LAWRENCE S. CHARFOOS & DAVID W. CHRISTENSEN, *PERSONAL INJURY PRACTICE: TECHNIQUE AND TECHNOLOGY* (1995).

client, lawyer and court, and client and court when dealing with matters of testimonial disclosure. Already noted is the right of the criminal to not be compelled as a witness, and that the lack of testimony in the form of a non-participatory silence cannot be declared unlawful.⁵⁹ Thomas writes “[w]ithholding the truth” that the witness “is not bound to avow”⁶⁰ is not falsehood or calumny. So, counsel may instruct a witness that testimony is not required despite the witness having knowledge of the truth or falsity of the subject matter. This litigation tactic is termed prudent by Thomas.⁶¹ Also instructive is Thomas’s suggestion that a witness “not lay bare his own guilt,”⁶² nor be subject to compelled testimony by a judge, who is not granted the power to examine, unless his guilt is “unmasked by another” to whom he is bound and obligated to answer.⁶³ It is only when that witness stands upright and announces to the world their innocence when the truth is otherwise that a legal falsehood is born. There are and will be cases when the “accused is not bound to satisfy”⁶⁴ the judge or other authority. Counsel who recommends non-incriminatory silence is attentive to Thomas’s distinction between the substantive, affirmative falsehood, which is categorically wrong, and the legitimate reason to not testify under questioning. A criminal defendant must answer a judge pertaining to that which the judge is lawfully allowed to ask. But the defendant may remain silent if the judge inquires about that which “he cannot ask in accordance with the order of justice.”⁶⁵

The relationship between a witness and the lawyer/advocate is a cumbersome and complicated one. In one way, Thomas exhorts truth. In another way, however, he respects the processes of adjudication as either limiting, expanding, or nullifying testimonial evidence. With wit and foresight, Thomas

⁵⁹ See AQUINAS, *supra* note 1, Q.69, Art. 2.

⁶⁰ *Id.* Art. 2, at 1490–91.

⁶¹ See *id.* (“[I]t is lawful for the accused to defend himself by withholding the truth that he is not bound to avow, by suitable means, for instance by not answering such questions as he is not bound to answer. This is not to defend himself with calumnies, but to escape prudently.”).

⁶² *Id.* Art. 1, at 1490 (explaining that it is not a falsehood to withhold the truth until it is extracted by someone else, but it is a falsehood to affirm innocence upon extraction when one is in fact guilty).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

expects the witness, the client, and his or her lawyer to test the legal waters with an aggressive, professional posture coupled with moral virtue. Witnesses are not empty shells spouting off whatever is fed their psyches. Witnesses, particularly those in peril of life and limb, should be more than lambs led to the slaughter, resigned and pessimistic, showing no resistance. In the ebb and flow of litigation and the dynamic of judges, lawyers, and parties, truth is not a rubber stamp, but a blend of both facts and law, of both substance and process. Thomas challenges the witness, the defendant especially, to use his or her intellectual arsenal. When dealing with the acceptable means to avoid the death penalty, Thomas urges the human actor to utilize his wits and tactical insight to defend oneself against death, "but only such as is accomplished with due moderation"⁶⁶ (*sed solum quae fit cum debito moderamine*).

Thomas's analysis of witnesses extends to questions of quality—the reliability and credibility of the purported testimony. Counsel's review of prospective testimony is a search for the *reliability* of what will be said, as well as its *credibility*; that quality of truth and falsity which renders or devalues testimonial evidence. Counsel filters the evidence in the initial interview by cross-checking, corroborative fact-finding, and other scrutiny. The lawyer who accepts testimony at face value is not performing this basic task. Even a story that is innocently offered without malicious or sinister motives may still lack credibility. Lawyers who utilize testimony that results from faulty memory, defect of reason, or confused perceptions are also failing in their primary duties. Thomas stresses the need for this type of testimonial quality control, resisting every level of doubt in the evaluation of a witness's presentation, but mindful that human beings have certain faults or inconsistencies in their recollection. Only false testimony directly and intentionally (*per se et ex intentione*) delivered is condemned.⁶⁷

The concern for testimonial quality can be detected in Thomas's discussion of evidentiary sufficiency. When is testimonial evidence to be believed? What should counsel do to

⁶⁶ *Id.* Art. 4, at 1492.

⁶⁷ *See id.* Q. 70, Art. 4, at 1496 (stating, "[I]f after thinking over the matter with due care he deems himself certain about that false thing, he does not sin mortally if he asserts it, because the evidence which he gives is not directly and intentionally, but accidentally contrary to what he intends.").

assure the believability and integrity of witness testimony? A witness who contradicts his testimony over a central, material matter necessitates the need for a greater number of witnesses. Otherwise, the evidence is to be deemed unworthy of belief. On most material issues or facts, Thomas urges the examiner to pay strict attention to overall credibility. On the other hand, Thomas asserts that witnesses can and do forget certain things. The materiality of evidence gauges the seriousness, or lack thereof, of the falsehood. Credibility is measured by essential, material questions of fact, not “whether the weather were cloudy or fine, whether the house were painted or not, or such like matters, such discrepancy does not weaken the evidence, because men are not wont to take much notice of such things, wherefore they easily forget them.”⁶⁸ Inaccuracy relating to minor, immaterial details does not make the witness’s testimony inadmissible.

This distinction between material evidence and irrelevant or immaterial subject matter is a perpetual caveat to counselors-at-law who weigh and evaluate the quality and content of testimony. Witnesses who are deplorably inconsistent in their recitations should not be the basis for any action in law. Punishments, findings of guilt or innocence, damage awards, and requests for legal or equitable remedies should stand on a foundation of evidentiary reliability, testimonial or not. Lawyers are obliged to: sift through the evidentiary deposit, assure justice in the legal marketplace and, even more poignantly, the call of salvation of those testifying. Giving testimony is not purely a functional exercise, but guarantees that due process and a substantive grounding exist in the case.⁶⁹

To allow witnesses to testify, either knowing or reasonably suspecting their lack of integrity, is to advance an injustice. Corrupt testimony is a “deformity”⁷⁰ in three ways. First, it affronts the oath of the testifier and causes perjury in the courtroom. Second, since every falsehood is a violation of justice,

⁶⁸ *Id.* Art. 2, at 1495. *Si tempus fuerit nubilosum vel serenum, vel si domus fuerit picta, aut non, aut aliquid hujusmodi; talis discordia non praejudicat testimonio; quia homines non consueverunt circa talia multum sollicitari, unde facile a memoria elabuntur.*

⁶⁹ *See id.* Art. 3, at 1496 (stating, “To give evidence is necessary for salvation, provided the witness be competent, and the order of justice observed.” (*Quod testificari est de necessitate salutis, supposita testis idoneitate, et ordine juris.*))

⁷⁰ *Id.* Art. 4, at 1496.

it is a "mortal sin generically"⁷¹ (*peccatum mortale*). Lastly, even if not mortal in design, Thomas characterizes each and every lie as a sin⁷² (*quod omne mendacium est peccatum*). Falsehood at every juncture in law and life itself is contrary to justice, and it behooves the lawyer to screen and test the testimony witnesses are to relay. For all falsehood, lying, and perjury is a mockery and slander to the judicial process, an infamy, an irreverence to God,⁷³ and a contempt of God.⁷⁴

IV. SPECIAL OBLIGATIONS OF THE LAWYER/ADVOCATE

Aside from these general prescriptions of truth that mold both man and counselor, Thomas perceives certain unique obligations in the legal profession. As in the defense or prosecution of a case, it is not enough to be functional as a lawyer/advocate. More relevant to Thomas is the law's proper ends and the means chosen by a lawyer to obtain those ends. Throughout this Article, we have repeatedly witnessed the melding of the law as a human enactment and the law in a teleological sense. The profession's subject matter places special demands upon lawyers beyond the grind and battles of daily practice. To be in law mandates that the lawyer engage in just activities in the courtroom and outside its hallowed halls. Thomas, displaying his prophetic foresight, preempts the twentieth century's concept of social justice and pro-bono legal practice.

A. *Legal Practice as a Work of Mercy*

Responding to whether or not a lawyer is obligated to represent the poor, Thomas pragmatically integrates the corporal works of mercy into legal practice. Suits of the poor do not mandatorily oblige the legal professional,⁷⁵ but a lawyer cannot

⁷¹ *Id.*

⁷² *See id.* ("Thirdly, owing to the falsehood itself, by reason of which every lie is a sin.").

⁷³ *See id.* Q. 98, Art. 3, at 1618 (describing that, "[I]t is an irreverence towards God.").

⁷⁴ *See id.* (explaining, "[A]n action which is, by reason of its very nature, a venial sin, or even a good action, is a mortal sin if it be done out of contempt of God.").

⁷⁵ *See id.* Q. 71, Art. 1, at 1497 ("Therefore neither is an advocate always bound to defend the suits of the poor.").

in every instance shun this need. Realizing that human needs are not exclusively physical, in the sense of nourishment or clothing, Thomas perceives a parallel need in bodily sustenance and the imperative of the advocate.⁷⁶ Further on, Thomas intimates that those of talent and blessings and in life's better station should not forget those in graver conditions since every man and woman is "bound to make good use of the talent bestowed on him, according to the opportunities afforded by time, place, and other circumstances. . . ."⁷⁷ Recognizing that Christian charity is balanced with: occupational capacity, economic realities, familial demands, and a never-ending stream of those in need, Thomas demands a contribution, not a lifelong obligation, "else he would have to put aside all other business, and occupy himself entirely in defending the suits of poor people. The same applies to a physician with regard to attendance on the sick."⁷⁸ No one lawyer can be encumbered with all of life's misery. To take on every suit of the poor would be a recipe for professional and personal destruction.

The lawyer, however, cannot escape the charitable responsibilities of the good life, and while circumstances amongst lawyers may differ, each advocate is capable of making a contribution to less fortunate litigants. When evaluating the propriety of lawyers' fees, Thomas again reminds practitioners that when setting their fees, they should be cognizant of human misery and its costs. Thomas suggests that doing merciful things for others reaps not a monetary reward, but divine applause. Accordingly, "when a man does give a thing out of mercy, he should seek, not a human, but a Divine reward. In like manner an advocate, when he mercifully pleads the cause of a poor man, should have in view not a human but a Divine need; and yet he is not always bound to give his services gratuitously."⁷⁹ At the

⁷⁶ See *id.* ("He that lacks food is no less in need than he that lacks an advocate." (*Non minor necessitas est indigentis cibo quam indigentis avvocato*)).

⁷⁷ *Id.* *Quod homo talentum sibi creditum tenetur utiliter dispensare, servata opportunitate locorum et temporum, et aliarum rerum, ut dictum est.*

⁷⁸ *Id.* *Alioquin oporteret eum omnia alia negotia praetermittere, et solis causis pauperum iuvandis intendere. Et idem dicendum est de medico quantum ad curationem pauperum.*

⁷⁹ *Id.* Art. 4, at 1499. *Sed quando eam misericorditer impendit, non humanam, sed divinam remunerationem quaerere debet. Et similiter advocatus quando causae pauperum misericorditer patrocinatur, non debet intendere remunerationem humanam sed divinam; non tamen semper tenetur gratis patrocinium impendere.*

same time, the merciful lawyer looks at his accounts and to his business ledger so that legal charity will not dissipate the lawyer's livelihood. Gilson speaks rightly of this balance between charitable delivery of legal service and the maintenance of a legal practice noting that "[a] lawyer or doctor who spent their time looking for indigents would find their clientele growing too rapidly for their income."⁸⁰

B. Confidentiality

In confidentiality analysis a privilege exists; a protection against divulsion of certain evidence whether it is testimonial or of other form. Reviewed thus far is the right not to be compelled to testify against oneself or be forcibly made to give testimony. During Thomas's era there was, and still is, an understanding of the privileges that existed between a priest/penitent and, to some extent, a lawyer/client. Privileges exist because of a general interest in fostering truth and honest discussion between the parties. Secrecy, for Thomas, has dual qualities—that of fidelity and guile. Fidelity is loyalty to another not to divulge what has been conditionally spoken, with the implied and express promise not to disclose its content. In fidelity we see the essence of human honor. Thomas briefly comments that "[i]t is contrary to fidelity to make known secrets to the injury of a person."⁸¹ Fidelity embraces the loyalty of one to another, not only in a professional sense, but in friendship and familial bonds. Thomas labels fidelity as a basis for not being bound to give evidence:⁸² "Against such a duty a man cannot be obliged to act on the plea that the matter is committed to him under secrecy, for he would break the faith he owes to another."⁸³

Privilege in the confessional is sanctimoniously and unreservedly protected by Thomas since the sacrament of confession "is more binding than any human precept."⁸⁴ In this instance, the truth of the conversation between the privileged

⁸⁰ GILSON, *supra* note 17, at 320.

⁸¹ AQUINAS, *supra* note 1, Q. 68, Art. 1, at 1486. *Quod revelare secreta in malum personae, est contra fidelitatem.*

⁸² See *id.* Q. 70, Art. 1 at 1493–94 ("Against such a duty a man cannot be obliged to act on the plea that the matter is committed to him under secrecy, for he would break the faith he owes to another.")

⁸³ *Id.* *Et contra hoc debitum obligari non potest per secreti commissum, qua in hoc frangeret fidem quam alteri debet.*

⁸⁴ *Id.* at 1493.

parties can be withheld from legal authority since the protection and content of the privilege outweighs the need for the evidence. Hiding information under the guise of privilege does not always infer guile, except when the party asserting the privilege “deceitfully hides the matter about which he makes the accusation.”⁸⁵

CONCLUSION

Consistent with Thomas’s world view of human activity and law, lawyers are expected to act in accordance with their essential nature, with reason being their *rule and measure*. Thomas’s lawyer is implanted with self-evident propositions, the primary tenet of the natural law—*doing good and avoiding evil*, and its *per se nota*, first principles, from self-preservation to procreation, as well as a panoply of secondary precepts. The Thomistic lawyer acts justly, gives everyone his or her due, searches for equality amongst people and things, and focuses on truth.

The Thomistic advocate engages in a sort of microscopic inquiry most present-day lawyers would find arcane and irrelevant. Today’s lawyer treads water in a sea of positivism, with billable hours being the prime incentive, instead of Thomas’s admonition to take only the just case and avoid falsehoods of every form, whether personal or that of a client or witness. To be sure, the practice of law consists of professional function and a series of job competencies. Side by side with function is the urgent reminder to do just things, to advocate truth. A lawyer must shun falsehood, craftiness, guile, and deceit, and frown upon litigation techniques that Thomas terms *calumny*, *collusion* and *evasion*. The lawyer is justice personified, intricately inspecting evidence, testimonial storylines, and fashioning accusations and defenses that are supportable by law and fact.

Add to this the lawyer’s obligation to himself, the court, his colleagues and, most importantly, to God. Lawyers should offer the advocate’s skill of representation to the poor, but not as a sole occupation, lest the lawyer remain professionally viable. They must latch onto the law from its written anchor and proffer

⁸⁵ *Id.* Q. 68, Art. 3, at 1488.

arguments zealously. An advocate should prudentially examine, defend, prosecute, and appeal the case and its parties. They should never apologize for the tenacity of their approach but should always be mindful of its integrity and goodness.

Thomas's lawyer is far more complicated than the prototype molded and produced by twentieth century America's legal education system. If the trend continues into the twenty-first century, we will continue to observe a lawyer product that takes on the armor of a social worker; one who helps others, cares mostly in an individualistic sense, and is chiefly, almost obsessively, governed by the language of *individual rights*. It is a safe bet that most law schools will care little about the moral life and more about the sensitive and caring lawyer who labors to right all the wrongs the world suffers from, a lawyer who perceives law, not as an ordination of reason and an expression of virtue, but as an instrument for positive, corrective humanism. Today, lawyers toy with law in a promulgative sense, finding laws already on the books, or those soon to be invented in the legal laboratory, a panacea for life's ills.

Thomas places human enactments at the bottom of his continuum of laws. Its last place finish does not imply a shortage of value. To the contrary, Thomas integrates and necessitates human law⁸⁶ into his entire schema. But the temptation when working with these temporal inventions—e.g., *regulations, ordinances, statutes*, and so on—is mesmerizing. Within the modern judicial perspective, lawyers truly believe that the legal enactment is power itself; having force inherently; being inherently coercive. It is only a matter of time before this same lawyer, believing in the false gods of positivism, elevates his or her own role into a mightier, supernatural dimension. According to Thomas, lawyers, like laws themselves, are not the architects of justice, but servants to it. The impotence of human law and the abject frailty of lawyers who advocate its content is obvious to Thomas. We can only fall short of just due⁸⁷ since our efforts restore only a portion of paradise lost. Thomas never loses sight of his place, the place of law and that of lawyers advocating in the temples of justice.

To judge belongs to God in virtue of His own power:

⁸⁶ *Id.*, Vol. I, Pt. II, Q. 95, Art. 1, at 1013–14.

⁸⁷ *See id.*, Vol. II, Q. 80, Art. 1, at 1527.

wherefore His judgment is based on the truth which He Himself knows, and not on knowledge imparted by others: the same is to be said of Christ, Who is true God and true man: whereas other judges do not judge in virtue of their own power, so that there is no comparison.⁸⁸

⁸⁸ *Id.* Q. 67, Art. 2, at 1484. *Quod Deo competit judicare secundum propriam potestatem; et ideo in judicando informatur secundum veritatem quam ipse cognoscit, non secundum hoc quod ab aliis accipit; et eadem ratio est de Christo, qui est verus Deus et homo.*

