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JUDGES AND JUDICIAL PROCESS IN THE JURISPRUDENCE OF ST. THOMAS AQUINAS†

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

St. Thomas' holistic picture of the human player makes it impossible for him to separate judicial function from personhood. The just man or woman will be the just judge. The virtuous disposition lends itself to a determination of what is due or not due. Other features of the judgeship do not escape St. Thomas' cutting mind. To judge, one must be in public officialdom and not occupy any ecclesiastical position and title. To judge laws correctly, St. Thomas favors the school of textualism known as "strict constructionism." To judge soundly, St. Thomas exhorts judicial officers to weigh and assess the credibility of witnesses and evidence, to afford a series of procedural and judicial rights, to rely on proper documentation, and to permit legitimate defenses (an elaborate procedural code is made available to defense and prosecution so that the truth may be tested in the legal arena). Most critically, St. Thomas permits judges to disregard, and even disavow the "unjust" law that is contrary to his jurisprudence of the telos.

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I. THE JUDGE IN THOMISTIC JURISPRUDENCE

Any key role or position in the justice system envisioned by St. Thomas can only carry out task and function when in accord with St. Thomas' overall philosophy. Judges are not only expected to pay more than glancing attention to the ideals of Thomistic jurisprudence, but to live and abide by its content. Judges short on justice and other virtues, or devoid of any teleological conception of law, will poorly perform the most basic of judicial functions, whether judgment, sentencing, evidentiary analysis, or testimonial evaluation. As ordinary men and women, judges are not a separate category of human species, but are endowed like any other rational being. St. Thomas calls judging a "craft,"[1] indistinguishable from human identity. The judicial capacity to deliver any version of justice is tied to our operative powers. As St. Thomas notes:

> Just as there pre-exists in the mind of the craftsman an expression of the things to be made externally by his craft, which expression is called the rule of his craft, so too there pre-exists in the mind an expression of the particular just work which the reason determines, and which is a kind of rule of prudence.[2]

Being a judge is not simply a job or occupational description, but a vocation, arising in and from the person who happens to engage in the particular role. The Thomistic impression of vocation and profession inevitably winds its way back to human capacity. Every person, including any judge, employs reason and the internal law of human existence to *rule and measure.* Each person is imprinted with the natural law, which is naturally known by man,[3] and each person can easily discern the secondary principles with minor reflection. The natural law itself is man's participation in the eternal law of God[4] and is woven into the fiber of the human person. St. Thomas resists the divisibility of person and craft and instead unifies them. Law is more than a craft, more than a series of competencies and behavioral obligations.

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[1] ST. THOMAS AQUINAS, 2 SUMMA THEOLOGICA pt. II-II, Q.57, art. 1, reply obj. 2, at 1431 (Fathers of the English Dominican Province trans., Benziger Bros. 1947).

[2] *Id.*

[3] *See* ST. THOMAS AQUINAS, SUMMA THEOLOGICA, *in* 2 BASIC WRITINGS OF SAINT THOMAS AQUINAS Q. 93, art. 4, at 762, 766–67 (Anton C. Pegis, ed. 1945).

[4] *See id.* Q. 91, art.2, at 750.

Law is a reflection of our unceasing and unquenchable thirst for what is true and good for justice itself. At the forefront, judges serve as gatekeepers to the judicial process and as arbiters of disputes. Judges must be persons of virtue and integrity. St. Thomas disqualifies those unfit in soul and those "who stand guilty of grievous sins"[5] from the judicial role because such people "should not judge those who are guilty of the same or lesser sins."[6]

A judge deficient in moral or intellectual virtue is incapable of judging correctly. A judge failing to exercise right reason will predictably issue improper and incoherent rulings. An unjust judge not only lacks justice but also lacks the other virtues necessary for the good life, acting not in accordance with the prescription for the moral life, but contrary to its ends.[7] St. Thomas' judge labors in a holistic manner, extending beyond the functional sense, blending competency of task with competency of soul. A "judge's task is justice."[8] The perfectly good person is the perfectly good judge "subject to the overruling of providence as is all creation."[9] The Thomistic judge implores for more than respect or jurisprudence exclusively dependent on "social practices and usages."[10]

The validity or regularity of judicial decision-making is not rooted in the chimerical theme of *respect*—that chameleon of amorality—but upon a natural moral law that generates and announces some fundamental precepts for human living. Judges judge correctly when being attentive to reason and the divine imprint as St. Thomas outlines in the *Summa Contra Gentiles11*:

> Moreover, it is the function of every lawmaker to determine by law the things without which observation of the law is impossible. Now, since law is proposed to reason, man

[5] AQUINAS, *supra* note 1, pt. II-II, Q. 60, art. 2, reply obj. 3, at 1447.

[6] *Id.*

[7] One of the few close looks at Thomistic jurisprudence in contemporary legal practice is the essay by Rev. Michael Harding, *True Justice in Courts of Law*, *in* 3 SUMMA THEOLOGICA 3348–49. (Fathers of the English Dominican Province trans., Benziger Bros. 1947).

[8] Joseph V. Dolan, *Natural Law and the Judicial Function*, 16 LAVAL THEOLOGIQUE ET PHILOSOPHIQUE 94, 107 (1960).

[9] ETIENNE GILSON, LAW ON THE HUMAN LEVEL: MORAL VALUES AND THE MORAL LIFE 197 (Leo Richard Ward trans., The Shoe String Press, Inc. 1961).

[10] Neil MacCormick, *Natural Law and the Separation of Law and Morals*, in NATURAL LAW THEORY 105, 107 (Robert P. George ed., Clarendon Press 1992).

[11] ST. THOMAS AQUINAS, SUMMA CONTRA GENTILES (Vernon J. Bourke trans., Univ. of Notre Dame Press 1975).

> would not follow the law unless all the other things which belong to man were subject to reason. So, it is the function of divine law to command the submission to reason of all the other factors proper to man.[12]

The true judge does all in accord with reason while the malicious and errant judge subverts human nature, by disregarding reason's instructions and the indelibly imprinted inclinations in our being. Gilson contrasts the just versus the unjust judge:

> The judge who in justice condemns on mere suspicion commits the most serious of sins against justice, since instead of judging according to rights, he is violating them. His act is a direct offense against the very virtue it is his duty to exercise. (citation omitted) Where there is no certitude, the benefit of the doubt should be given to the accused. The judge's duty, to be sure, is to chastise the guilty, and all of us must condemn the wicked in our inner forum. But it is better to err many times by acquitting the guilty than even rarely to condemn the innocent.[13]

The true judge avoids sentimentality, personal preference and opinion, and is unafraid of carrying out both the unpopular and popular purposes of the law. The responsible judge is the equalizer, the bearer of proportionality and the restorer of equilibrium. Judging is lawful only when consistent with the ends of justice itself and to be proper, its root power rests in the "sovereign as a master-virtue, (citation omitted) commanding and prescribing what is just."[14]

Judges, when delivering judicial sentences such as death, imprisonment, or restitution, do not sin against the person upon whom punishment is imposed.[15] Neither is the sentence imposition, if varied according to circumstance, a *sin against the respect of the person*.[16] Punishment responds to the sin itself. To the misfortune of the incarcerated or charged party, judges should not only focus on the individual dilemma but the need for a restoration of personal or communal equality. A judge's judgment

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[12] *Id.* at 142.

[13] ETIENNE GILSON, THE CHRISTIAN PHILOSOPHY OF ST. THOMAS AQUINAS 311 (L.K. Shook trans., Random House 1956).

[14] AQUINAS, *supra* note 1, pt. II-II, Q. 60, art. 1, reply obj. 4, at 1447.

[15] *See id.* pt. II-II, Q. 63, art. 4, at 1465.

[16] *See id.* pt. II-II, Q.63, art. 1, at 1462.

is just if it restores the individual harmed or benefits the common good.[17] A judge may determine therefore, according to the distributive philosophy of justice that certain cases or situations are to be decided differently relative to circumstance, parties or other mitigating factors. In this circumstance, St. Thomas urges jurists to weigh and evaluate cases on more than the pertinent statute or code, on more than the written language of the law, in order to avoid becoming wholly dependent on punishment as the sole basis for the judicial process. St. Thomas issues sound advice:

> [J]udgment is an act of justice, in as much as the judge restores to the equality of justice, those things which may cause an opposite inequality. Now respect of persons involves a certain inequality, in so far as something is allotted to a person out of that proportion to him in which the equality of justice consists.[18]

Inequality entails neither an intentional injustice or harm, nor the willful disregard for what is in equilibrium, but a reflection of life's varying stations and degrees.[19] The quality of the justice may differ for those empowered by money, political power, or social class, and those less fortunate.

II. THE FORMAL REQUIREMENTS OF A JUDGESHIP

St. Thomas expends considerable time outlining the formalities of judicial qualification from diverse viewpoints: 1) qualities and attributes; 2) requirements and qualifications; 3) function and decision-making.[20] St. Thomas is very serious about the formal prerequisites for being a judge, since the authority of a judge is granted by the sovereign, the king, or the populace. Temporal authority, in addition to divine providence, empowers jurists. Judges effecting judgments do so by "authority from the ruler to do so."[21] As a result, judges do not operate in some individual domain but from public authority.

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[17] *Id.* pt. II-II, Q. 63, art. 4, reply obj. 1, at 1465.
[18] *Id.* pt. II-II, Q. 63, art. 4, at 1465.
[19] *Id.*
[20] *Id.* pt. II-II, Q. 60, art. 2, at 1447.
[21] GILSON, *supra* note 12, at 310.

A. The Judge as Public Official

Throughout his jurisprudence, St. Thomas makes plain that the task of judging is reserved to public officialdom. Judgment and judging resides in the individual endowed with some form of authority. Without formal sanction a judge's act is non-binding.[22] St. Thomas goes out of his way to repeatedly deliberate on this aspect, one example referencing the Book of Deuteronomy. "Thou shalt appoint judges and magistrates in all thy gates . . . that they may judge the people with just judgment."[23]

Judging, St. Thomas advances, is by its nature a *public* act, necessitating public position, even when dealing with the "hidden"[24] subject matter. Judicial process itself—the operation of courts, evidence, witnesses, and testimony—represent a system built in the public domain. Private judicial process dismantles any notion of how a justice system should operate. To further his argument, St. Thomas condemns any form of judging exerted by private individuals. He labels private adjudication a *usurpation*[25] of, and of a *perverse,*[26] judicial process. St. Thomas' judge stands before not only the individual but also the entire community of inhabitants because Judges interpret and enforce the law not according to individual demands alone, but, more appropriately, according to the collective intention of a political and social system. By focusing on the public side of a judgeship, St. Thomas emphasizes the social, political, and ethical relationship between individual and society. Moreover, this idea cautions jurists to remember their station and purpose and to be mindful of a judge's public, communal accountability. St. Thomas avidly portrays this public responsibility:

> 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

[22] *See* AQUINAS, *supra* note 1, pt. II-II, Q. 67, art. 1 at 1482–83; *see also* GEORGE QUENTIN FRIEL, PUNISHMENT IN THE PHILOSOPHY OF SAINT THOMAS AQUINAS AND AMONG SOME PRIMITIVE PEOPLES 126 (The Catholic Univ. of Am., diss. 1939).

[23] AQUINAS, *supra* note 1, pt. II-II, Q. 60, art. 2, at 1447 (quoting *Deuteronomy* 16:18).

[24] *Id.* pt. II-II, Q. 60, art. 2, reply obj. 3, at 1447.

[25] *Id.* pt. II-II, Q. 60, art. 6, at 1450.

[26] *Id.*

> 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.[27]

St. Thomas is unflinchingly determined about the public nature of judicial office. While advocating the justness of the death penalty sentence in select cases, he firmly excludes any private citizen the right to pronounce or carry it out. Public authority[28] tends to weigh any issue in a greater collective sense, while the whims of the private citizen, whose disposition is less concerned with the general welfare than that of his own lot, will be unpredictable. St. Thomas is reticent, almost nervous, about the prospect of a private citizenry entrusted with the power to inflict punishment. Individualized, vigilante justice is antagonistic to the common good.[29] One entrusted by political mandate or appointment perceives the responsibility on a grander scale.

That same reservation about privatized judges is quite clear in St. Thomas' objection to a cleric or churchman charged with orchestrating the death penalty. It belongs to a public official, whose views and perceptions emerge from a more comprehensive landscape, to deliver this type of sentence. Urging ecclesiastical prelates to "imitate their master",[30] Jesus Christ, St. Thomas reserves the power of this penalty to those in the juridical realm. The separation of ecclesiastical and juridical functions is an unequivocal requirement for the justice system, so much so that St. Thomas passionately "condemns"[31] religious who utilize formal judicial process to achieve particular aims.[32] As noted above, the law in human terms is incapable of addressing, advancing, or eradicating all that is wrong with the world[33]—an ambition rightfully reserved to ecclesiastical powers, whose task is primarily the salvation of souls. This salvation end-game is not

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[27] *Id.; see also* Dolan, *supra* note 8, at 109.

[28] AQUINAS, *supra* note 1, pt. II-II, Q. 64, art. 3, at 1467.

[29] *Id.* pt. II-II, Q. 64, art. 3, at 1468.

[30] *Id.* pt. II-II, Q. 64, art. 4, at 1468.

[31] *See* ST. THOMAS AQUINAS, AN APOLOGY FOR THE RELIGIOUS ORDERS 301–13 (Fr. John Procter ed., B. Herder Book Co. 1902).

[32] *See id.*

[33] 1 *id.* pt. I-II, Q. 96, art. 2, at 1018 (Fathers of the English Dominican Province trans., Benziger Bros. 1947).

the province of the lawmaker, the jurist, or the judge.[34] Only by experience, training, and application will a judge be capable of issuing sound legal decisions. The private individual and the churchman has no such competency; therefore, St. Thomas declares, "[I]t is unjust for anyone to be judged by one who has no public authority."[35]

B. The Judge as Legal Interpreter

Another facet of St. Thomas' jurisprudence worth a closer look, is his philosophy of judicial interpretation. What does a judge rely upon when interpreting law and facts? When deliberating, how much does the text of a law guide the arbiter? How dependent is the interpreter on external knowledge, principles of equity, and legislative history? How does a judge most accurately interpret and apply legal principles?

Generally, St. Thomas can be labeled a *strict constructionist*—the school of legal thought vigorously attentive to text, the written language of the law, when resolving a legal question. By contrast, a *judicial activist* uses the language of the law as an interpretive starting point, subsequently jumping off into other dimensions when ready to declare a decision or finding. An illustration of the activist is the assertion of a constitutional right to homosexual activity under the First Amendment's *free exercise of religion* or *free press* terminology.[36] Aghast, the strict constructionist looks at religion and press from the literal meaning, while the activist imagines an abridged freedom tangentially tied to nonexistent language, whether by inference or imputation. As judicial activists are so prone to doing, they invent *penumbras*[37] of privacy, none of which are explicitly enunciated in the Constitution, to further their goal of inclusion, while the strict constructionist goes no further than the text on the table. St. Thomas' theory of interpretation is by most measures strict:

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[34] *See* Charles D. Skok, PRUDENT CIVIL LEGISLATION ACCORDING TO ST. THOMAS AND SOME CONTROVERSIAL AMERICAN LAW 123 (Pontificiam Universitatem S. Thomae, diss. 1967).

[35] AQUINAS, *supra* note 1, pt. II-II, Q. 60, art. 6, reply obj. 1, at 1451.

[36] *See* Bowers v. Hardwick, 478 U.S. 186, 190–91 (1986) (addressing whether a fundamental right of privacy exists for sodomy purposes).

[37] *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (finding that a right to use contraceptives falls under the penumbra of the constitutional right of privacy); *see also* Roe v. Wade, 410 U.S. 113, 129 (1973) (finding that the implied constitutional right of privacy encompasses abortions).

"[H]ence it is necessary to judge according to the written law, else judgment would fall short either of the natural or of the positive right."[38]

For St. Thomas, written language provides an anchor for law and its interpretation. He believed that "[j]udgment must be rendered according to the written law."[39] From a practical perspective, judicial interpretation depends upon a consistent benchmark— that of the written law—because without a writing, the interpretation would produce an endless array of results. But writings are not the sole grounds for legal principles or ideas. The wise interpreter can never forget that natural rights, granted to man by his God and implanted by the natural law, are relevant to any legal interpretation. These natural rights may or may not take written form, but assuredly, no written law can contravene the purposes of these natural rights.[40] St. Thomas suggests no allegiance to any written law contrary to the teleological principles so often announced, nor any adherence to the word of said laws since such laws are "corruptions of law, . . . and consequently judgment should not be delivered according to them."[41] Laws inconsistent and contrary to the eternal, natural, and divine legal continuum are not laws at all, and a text enabling this type of law is not worthy of our interpretation, as such laws are "unjust"[42] and have "no binding force."[43] When a Thomistic interpretation occurs, one must not detach oneself from the ethical and moral dimensions infused in the law. Adherence to textual meaning depends upon adherence to the teleological and moral order of St. Thomas, as well as the words of the law.[44]

C. Evidence and Credibility

Continuing his discourse on legal interpretation, St. Thomas gauges not only his method of judicial interpretation but also lays out sound suggestions on how a judge should weigh evidentiary quality. Since judges are expected to rule on evidentiary

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[38] AQUINAS, *supra* note 1, pt. II-II, Q. 60, art. 5, at 1450.

[39] *See* FRIEL, *supra* note 21, at 127.

[40] *See id.*

[41] AQUINAS, *supra* note 1, pt. II-II, Q. 60, art. 5, reply obj. 1, at 1450.

[42] *Id.*

[43] *Id.*

[44] For a further explanation of this proposition, see HEINRICH A. ROMMEN, THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY 188 (Thomas R. Hanley, trans., B. Herder Book Co. 1947).

questions—such as admissibility, suppression, limitation and exclusion—their rulings need adequate grounding. In general, St. Thomas admonishes the jurist to avoid any judgment that is grounded upon suspicion, as certainty is the mettle of evidentiary quality. Suspicion consists not of factual certitude, but "evil thinking based on slight indications."[45] Certainty insures credible judgment, which in turn assures justice. Certainty is not infallibility, but a significant evidentiary quality which is "not indeed the certainty of a demonstration, but such as is befitting the matter in point."[46] A judge, as mediator between the plaintiff and defendant, regularly issues rulings on evidentiary questions, and is expected to provide an environment where the evidence submitted and admitted is of inherent credibility.

Addressing whether more than two or three witnesses are mandatory for credibility purposes, St. Thomas characterizes the numerical requirements of witnesses as artificial and unreliable:

> For in human acts, on which judgments are passed and evidence required, it is impossible to have demonstrative certitude, because they are about things contingent and variable. Hence the certitude of probability suffices, such as may reach the truth in the greater number of cases, although it fail in the minority.[47]

Witness testimony which is contradictory on material matters can still be admitted into evidence since the contrasts illuminate the dilemma at hand, and allow a beneficial doubt to flourish on behalf of a particular party. St. Thomas analyzes these shifting burdens and presumptions with uncanny legal insight. In most cases, St. Thomas recommends the accused being given the "benefit of the doubt."[48] That is, he suggests the evidence is to be favorably construed for the defendant rather than for the plaintiff or the prosecutor:

> The evidence is not weakened if one witness says that he does not remember, while the other attests to a determinate time or place. And if on such points as these the witnesses for prosecution and defense disagree altogether, and if they be equal in number on either side, and of equal standing, the accused should have the benefit of the doubt, because

[45] AQUINAS, *supra* note 1, pt. II-II, Q. 60, art. 3, at 1448.
[46] *Id.* pt. II-II, Q. 60, art. 3, reply obj. 1, at 1448.
[47] *Id.* pt. II-II, Q. 70, art. 2, at 1494.
[48] *Id.* pt. II-II, Q. 70, art. 2, reply obj. 2, at 1494.

> the judge ought to be more inclined to acquit than to condemn, except perhaps in favorable suits, such as a pleading for liberty and the like.[49]

Amazingly, St. Thomas differentiates evidence—its content, quality, and contestability—from the essence of the person offering it by the truth or falsity of a particular allegation. Put another way, St. Thomas can scrutinize the defendant or the plaintiff from the very evidence before the trier of fact. What is proffered into evidence may be true yet rejected, and practical wisdom demands that the judge and jury be capable of differentiating legal and factual truth. In this fashion, an evidentiary record may be so insubstantial that it *frees* a guilty defendant, or it may appear so formidable as to award a disproportionate damage award to a feigning party. "[E]vidence is not infallible but probable; and consequently the evidence for one side is weakened by whatever strengthens the probability of the other."[50]

Like a seasoned judge, St. Thomas also categorizes testimonial evidence that is naturally suspect because of the party or circumstances involved in it. Credibility, therefore, depends on the message and the messenger. Those laboring under a defect of reason—the imbecile, the infant, and in an utterly sexist vein, "women"[51], or "persons united by family or household ties, or again owing to some external condition, as in the case of poor people, slaves, and those who are under authority, concerning whom it is to be presumed that they might easily be induced to give evidence against the truth,"[52]—are other troublesome evidentiary categories for St. Thomas. Modern day experts in judicial process evaluate the credibility of witnesses and testimony using similar strategies.[53] "Saint Thomas would exclude from giving testimony men labouring under defects of bad character, as unbelievers and persons of evil repute, as well as

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[49] *Id.*

[50] *Id.* pt. II-II, Q. 70, art. 3, at 1495.

[51] *Id.*

[52] *Id.*

[53] *See generally* CHARLES P. NEMETH, LITIGATION, PLEADINGS AND ARBITRATION,. (2nd ed., Anderson Publishing Co. 1997); LAWRENCE S. CHARFOOS AND DAVID W. CHRISTENSEN, PERSONAL INJURY PRACTICE: TECHNIQUE AND TECHNOLOGY (Bancroft-Whitney Co. 1986); PAUL FUQUA AND JAMES WILSON, SECURITY INVESTIGATOR'S HANDBOOK (1979) for a discussion of various techniques.

those who are guilty of a public crime, and who are not allowed even to accuse."[54]

St. Thomas grants every witness a presumption of honesty and integrity and "good is to be presumed of everyone unless the contrary appear (citation omitted)."[55] By presumption St. Thomas recognizes the need for witnesses to be given the benefit of the doubt. Doubt is weighed not to benefit the prosecutorial attorney but the beleaguered party being prosecuted. Doubts generate incredible, not credible, evidence in St. Thomas' eyes, and judges should avoid decision-making on these shaky grounds.

> He who interprets doubtful matters for the best, may happen to be deceived more often than not; yet it is better to err frequently through thinking well of a wicked man, than to err less frequently through having an evil opinion of a good man, because in the latter case an injury is inflicted, but not in the former.[56]

Judges are required to preferentially weigh disputed and doubtful evidence on behalf of a defendant and to avoid an obsession to convict or condemn. A judge must always be mindful of the possibility that inordinate zeal may lead to the condemnation of an innocent person.

At no place is the evidentiary genius of St. Thomas more apparent than in his discussion of evidence, truth, and the power of a judge to rule.[57] St. Thomas integrates the role and occupation of a judge with that of a human person who dons the robes. St. Thomas vigorously corrects the advocate who thinks it is possible for a judge to separate judicial decision-making from the evidence presented. Cases of every kind can be decided on a host of rationales that lack evidentiary rigor; these rationales include sentimental, racist, political, criminally corrupt, mindless, or angry decision-making. St. Thomas scolds those who want justice without the evidentiary record to support it. In one case, a judge, as a person, may know or feel something which has not been submitted by the advocates. In another case, the formal record of evidence may be insubstantial and vacuous. How does the judge decide? It is the judge's role as information gatherer that provides the basis for judicial reasoning, not the private

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[54] *See* FRIEL, *supra* note 21, at 136.
[55] AQUINAS, *supra* note 1, pt. II-II, Q. 70, art. 3, at 1495.
[56] *Id.* pt. II-II, Q. 60, art. 4, reply obj. 1, at 1449.
[57] *See id.* pt. II-II, Q. 67, art. 2, at 1483.

knowledge of the citizen who dons the robes. Judgement is "based on information acquired by him, not from his knowledge as a private individual, but from what he knows as a public person."[58]

If that same judge cannot pronounce judgment on the evidence presented, acquittal or dismissal is proper. Accordingly, St. Thomas suggests the real, indisputable truth may exist simultaneously with a legal truth, which is derived from either strong or weak evidence. In every case before the court, decisions have to be rooted in the evidence. The judge may know, after sifting through the evidentiary record, that a decision soon to be rendered is contrary to the truth of the matter. Legal truth depends so heavily upon the court's evidentiary record that any judgment rendered will rest more upon this legally suspect conclusion than the unsubstantiated, though truthful, allegation. For St. Thomas, the personal conscience of a judge is subject to the functionality of the judgeship. "In matters touching his own person, a man must form his conscience from his own knowledge, but in matters concerning the public authority, he must form his conscience in accordance with the knowledge attainable in the public judicial procedure."[59] St. Thomas respected the province of the jury as fact-finder, and he cautioned judges to show respect for deliberations even though the judges knew differently.

It is apparent that St. Thomas affords significant respect to evidentiary matters at many points in his legal writings. The business of judgment, as delivered by judges and juries, is no small matter. Our efforts to judge rightly, humbly, and adequately pale before the Divine judge who deliberates in perfect equilibrium and who accords proper weight and credibility to each class of evidence, as well as knowing when to convict and when to acquit. The human agent, as in every facet of existence, struggles to get it right. What is certain is the magnitude St. Thomas attributes to evidentiary credibility. The ramifications posed by St. Thomas for false testimony elucidate the centrality of evidential integrity in St. Thomas' jurisprudence. Terming falsehood in evidence a *"mortal sin,"*[60] any judgement that arises from such testimony will be "unjust" and not a judgment in any sense.[61] False testimony is graphically described by St. Thomas

[58] *Id.* pt. II-II, Q. 67, art. 2, at 1484.
[59] *Id.* pt. II-II, Q. 67, art. 2, reply obj. 4, at 1484.
[60] *Id.* pt. II-II, Q. 70, art. 4, at 1496 (emphasis added).
[61] *Id.*

as a "*deformity.*"[62] This condemnation is supported by St. Thomas' description of perjury as a "contempt of God"[63] that incurs the penalties pertinent to mortal sin. This is graver than *infamy* when viewed in a court of law.[64]

A final suggestion from St. Thomas, relating to quality of judicial interpretation, involved experience and practical wisdom. Legal decision-making is best when prudentially executed. Experienced judges are fortunate enough to predict impacts and ramifications and to discover how singular rulings influence the communal whole. Judges and lawmakers, as St. Thomas recommended in his *Commentary on Aristotle's Nicomachean Ethics*, are most effective when experienced. "But the inexperienced understandably are ignorant whether a work is done well or badly, on the basis of what is in books. Now laws are, as it were, the effects of the art of politics."[65] So much of modern judicial activism lacks this perspective. Time and experience do much to advance judicial wisdom, St. Thomas determined. "But those who review things of this kind without ability cannot properly judge except by chance; although they will become more capable of understanding them."[66]

III. JUDICIAL PROCESS

In the area of courtroom and judicial processes, St. Thomas provided a remarkable series of procedural insights. Respect for person, in the roles of defendant and plaintiff, is a hallmark of St. Thomas' judicial process. Respect for authority, either a ruler, state or a judge as decision-maker, is an equally important criteria in St. Thomas' justice machinery. St. Thomas' justice enterprise is developed not in the spur of the moment, nor as an afterthought, but is a well-thought out, artfully devised system of legal checks and balances. Included are procedural and substantive protections for the litigating parties, caveats and restraints on judicial demeanor, and a dedication to the rule of law.

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[62] *Id.* (emphasis added).

[63] *Id.* pt. II-II, Q. 98, art. 3, at 1618.

[64] *See id.* (emphasis added).

[65] ST. THOMAS AQUINAS, COMMENTARY ON THE NICOMACHEAN ETHICS, (C. I. Litzinger trans., Henry Regnery Co. 1964) X. L.XVI: C 2176.

[66] *Id.* at 2178.

Judges are delegated the responsibilities of assuring these procedural rights, the conduct of court, and the integrity of the litigants. What remains here is a brief overview of rules and standards relevant to judicial conduct and courtroom expectations.

A. The Jurisdictional Mandate

Early in his discussion, St. Thomas cuts to the issue of *jurisdiction*. *Jurisdiction,* the right of a court to hear a case, based on authority over person or particular subject matter, erects a procedural forum and locale. Jurisdiction, for example, over tax matters is reserved to the tax court, patents to the patent court, and appeals to the appellate court. St. Thomas' admonition that only public authorities have the power to judge is also a jurisdictional question. Private parties lack both the power and the jurisdictional authority to hear or resolve a case, while public figures can declare the jurisdictional mandate. St. Thomas claimed that a judge lacks jurisdiction to judge if the power to do so had not been delegated,[67] nor will the judge be competent if devoid of any ordinary juridical authority. Lacking power—the authority to bind or oblige—St. Thomas would dismiss any proceedings in a case of faulty jurisdiction. As the general law has a coercive power or quality, the judgeship depends upon the same; otherwise, proclamations from judicial authority would be of minimal effect. St. Thomas unreservedly connected the authority of law with the occupational efficacy of the law since "[a] judge's sentence is like a particular law regarding some particular fact."[68] Further illustrating his procedural rigor, St. Thomas offered an advanced theory of pendant and/or ancillary jurisdiction whereby two courts, e.g., state and federal, have province over the same person or subject matter. In his example, dual jurisdiction of monk/monastery and monk/state would exist for religious infractions if the once *"exempt[ed]"*[69] religious committed murder or theft.

B. The Role of Accusation

St. Thomas said no case should proceed to formal litigation

[67] *See* AQUINAS, *supra* note 1, pt. II-II, Q. 67, art.1, at 1482.
[68] *Id.* pt. II-II, Q. 67, art. 1, at 1483.
[69] *See id.* (emphasis added).

without an accusation. To accuse is to trigger a systematic response. Accusation, according to St. Thomas, is the first maneuver in a series of moves in the typical criminal litigation. The judge and the justice system stand idle until a complaint and a complainant—a victim and a perpetrator—emerge. Crime victims are "bound"[70] to accuse, not only for their good, but also for the common interests and safety of the community. The solid citizen reports and screams loudly of injustice. St. Thomas' obligatory tone in the case of criminal activity does more than suggest the reporting of criminal conduct, but urges a full-scale public pronouncement. Individuals who idly sit by as crime increases are injurious to the "commonwealth," *detrimentum reipublicae,* and are an agent in the "bodily or spiritual corruption of the community."[71]

Judges are not warranted or justified in proceeding with any case if lacking an accused or an accusation. In St. Thomas' world, the court insists on two parties to a criminal case; the state's allegation alone is not sufficient. Lacking either a plaintiff or defendant, a case is merely in expectancy.

A judge is paralyzed until an accusation crystallizes, and St. Thomas sternly critiques any judge who decides, condemns, or penalizes a defendant without the existence of an accuser and an accusation. St. Thomas insisted on the necessity of accusation:

> [J]ustice is not between a man and himself but between one man and another. Hence a judge must . . . judge between two parties, which is the case when one is the prosecutor, and the other the defendant. Therefore in criminal cases the judge cannot sentence a man unless the latter has an accuser . . . ."[72]

So convinced of the importance of accusation, that confrontational quality which apprizes defendants of what criminal acts or civil wrongs are alleged, St. Thomas requires that it be memorialized in a *writing.* The business of criminal litigation is so serious that St. Thomas wanted the parties to be accurate in their assertions, to be confident of the facts and legal queries at hand, and to deliver to the court an initial record from which the conduct of trial can be governed. Verbal allegations

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[70] *Id.* pt. II-II, Q. 68, art. 1, at 1486.
[71] *Id.*
[72] *Id.* pt. II-II, Q. 67, art. 3, at 1484.

transform into faded memories and any judgment or sentencing that was drawn up without the aid and assistance of a memorialized record is likely to cause injustice. It is the judge that "stands between the accuser and the accused for the purpose of the trial of justice, wherein it behooves one to proceed on certainties, as far as possible."[73] Writings also may serve as a testimonial substitute, a permanent record for evidentiary purposes, and as a basis or report for a judge's sentence. Accusations based on puffery, braggadocio, collusion, or evasion[74] are unacceptable in any litigation. During St. Thomas' time, as now, victims and witnesses were amply capable of inventing or devising less than credible accusations. To charge falsely is to *calumniate* the accused; to *collude* is to team up with others to invent an accusation; to *evade* is to fail to report even though true.[75] Any defect in the accuser or the accused, or the accusation itself, is declared by St. Thomas injurious to the person and the common good. The accuser "must eschew any total withdrawal of the accusation which would be in detriment to the common good."[76] False accusations must be harshly and swiftly dismissed and remedied. Mistakes or errors in process, charges, or loss of memory do not rise to the level of unjust accusation, and may be modified or corrected.

False accusation can justify retaliation whereby the wrongful accuser suffers like "punishment."[77] To achieve equilibrium, St. Thomas suggests retaliation to cure the imbalance through a "punishment of disgrace"[78] for those falsely accusing.

C. The Power to Punish

St. Thomas reserves the right to punish for public and legal officers and forbids the imposition of punishment by private and ecclesiastical authorities. Punishment personifies his theory of justice and the virtues. Punishment is what is due. Judges are delegated the power to punish, to sentence, to initiate the loss or forfeiture of rights, to imprison, to physically penalize and to execute. With justice as the centerpiece in a sentencing policy,

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[73] *Id.* pt. II-II, Q. 68, art. 2, at 1487.
[74] *See id.* pt. II-II, Q. 68, art. 3, at 1488.
[75] *See id.*
[76] FRIEL, *supra* note 21, at 131.
[77] AQUINAS, *supra* note 1, pt. II-II, Q. 68, art. 4, at 1488.
[78] *Id.* pt. II-II, Q. 68, art. 4, reply obj. 3, at 1489.

the judge is attuned to proportionality and equality. Thomistic jurisprudence affords wide-ranging judicial discretion in the application and enforcement of sentences, but admonishes the judge who exerts too much power, especially when unilaterally deciding that a lawful and just sentence should be remitted. St. Thomas does not forbid the demonstration of mercy and individualized case-by-case review. Part of his work dwells upon the nature of mitigation, depicted by ignorance, accident, and involuntary acts. This form of judicial discretion is appropriate to the role of judge.[79] In denying a judge the right to remit punishment, St. Thomas justifies his refusal on two fronts: first, that the parties who have just litigated and adjudicated their cases would be left in an imbalanced, imperfect situation; second, to remit punishment, a judge would undermine the fundamental responsibility of a judge.[80] St. Thomas imparts any right to remission in the ruler, the sovereign power whose acts "do not seem detrimental to the public good."[81]

[79] *See id.* pt. II-II, Q. 67, art. 4, at 1485.
[80] *Id.*
[81] *Id.*