REVUE ROUMAINE DE PHILOSOPHIE

Tome 68 Nº 1 Janvier–Juin 2024

SOMMAIRE

JOHN STUART MILL AND THE POSITIVE PHILOSOPHY OF THE NINETEENTH CENTURY

(Guest editors: Susan Krantz Gabriel, Ion Tănăsescu)

NOTES PHILOSOPHIQUES

Rev. Roum. Philosophie, **68**, *1*, p. 1–222, București, 2024

LAW, MORALITY, AND THE STATE'S JUSTIFICATION OF PUNISHMENT: AQUINAS, J.S. MILL AND BRENTANO

CYRIL M^{C}DONNELL

Abstract. Even though their views differ on what constitutes the proper relationship between morality and the law, Aquinas, J.S. Mill and Brentano all agree that the state is morally justified in inflicting punishment on those who are found guilty of infringing state law and committing crime. Punishment is necessary, they argue, for the purposes of bringing about law compliance and a better society. Punishment, however, steps in after the law has not been complied with and, even when transacted, punishment is no guarantee of any moral betterment in society. Notwithstanding the different moral theories that Aquinas, Mill and Brentano elaborate, this paper argues that each of these authors hold an *a priori moral* conviction in the state's justification of punishment, but this cherished conviction can be called into question on practical, moral and state grounds.

Keywords: law; morality; moral theories; justification; state punishment; crime.

Contra facta dialectica non valet.

INTRODUCTION

The well-known expression in modern English-speaking philosophy of the general theory concerning the relevance of moral considerations in determining state law is found in John Stuart Mill's famous essay *On Liberty* (1859) wherein he declares:

> The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection: the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.

Cyril M^{c}Donnell ✉
Maynooth University, Ireland
E-mail: Cyril.McDonnell@mu.ie

Rev. Roum. Philosophie, **68**, *1*, p. 85–101, Bucureşti, 2024

> He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right.[1]

Some thirty years later in a public lecture delivered to the Vienna Law Society on "The Origin of our Knowledge of Right and Wrong" on the 23 January 1889, and published in the same year, Franz Brentano rejects this modern argument for the separation of morality and the state.[2] Following, instead, a tradition in the philosophy of law that has had a continuous history from the beginnings of organised thought in Europe, he argues that the function of the state is to evaluate the common good for its citizens as members of a society. The state, therefore, has a moral purpose. The state is and should be concerned about actions of its citizens that promote or thwart this goal. The preservation of society *as such*, in other words, is not the main goal or a proper function of the state. Furthermore, since part of what it is to be an individual human being is to exist in a set of relationships of equality and interdependence with fellow human beings, "the state exists for man, not man for the state".[3] As Aristotle puts it and Aquinas agrees, "man by nature is a social animal as is proved in Politic. i. 2)".[4] In Aristotle, Aquinas and Brentano's estimation, therefore, to separate moral considerations of the common good of citizens and individuals and the self-protection of society as such in the way in which Mill does, is detrimental both to the state and to the individual. Indeed, in this regard we can appreciate "Aristotle's somewhat puzzling dictum that Moral Philosophy is a kind of Politics", as one commentator puts it and why, as Matthew O'Donnell also points out, "discussion of the role of morality in legislation, far from being an alien intrusion, is central both to Moral Philosophy and to Politics".[5] In sum, for Aristotle, Aquinas and Brentano, politics entails doing ethics.

In his moral defence of the justification of the state in inflicting punishment on those who infringe state law and commit crime, therefore, Brentano ties its justification to its effectiveness and necessity in bringing about both the moral betterment of individuals in society and the protection of the common good of society in much the same way as Aquinas does. Whether the state, however, justifies punishment by following Mill's harm-to-others principle or its evaluation

[1] John Stuart Mill, *On liberty*, London, Parker & Son, 1859, pp. 21–22.

[2] Franz Brentano, *Vom Ursprung sittlicher Erkenntnis*, Leipzig, Duncker and Humbolt, 1889. "The origin of our knowledge of right and wrong", in Franz Brentano, *The origin of our knowledge of right and wrong*, translated by Roderick M. Chisholm and E. Schnerwind, London and New York, Routledge and Kegan Paul, 1969, pp. 3–46. Henceforth, abbreviated as OKRW.

[3] Franz Brentano, "Epicurus and the war", in the Zurich *Internationale Rundschau*, January 15, 1916, in Appendix, OKRW, pp. 122–124 (p. 123).

[4] Thomas Aquinas, *Summa Theologiae* I–II, q. 95, art. 4.

[5] Matthew O'Donnell, "Legislation and morality" (1991, unpublished), in Matthew O'Donnell, *Moral concern for society: A tribute*, edited by James McEvoy, Maynooth, St Patrick's College, Maynooth and the Irish Philosophical Society, 2006, pp. 131–146 (p. 132).

of the common good and moral betterment of its citizens as Aristotle, Aquinas and Brentano maintain, it is assumed that such a practice is morally defensible.

Notwithstanding the different positions that are taken by Aquinas, Mill and Brentano on the issue of what constitutes the proper relation of morality to law, all of these authors, therefore, seem to hold an *a priori moral* conviction that the state is justified in the existence of its institution of punishment. The problem with this, nevertheless, is not that each of these authors are able to elaborate different (and irreconcilable) general moral theories justifying the practice of state punishment – whatever format such punishment may take – but that they assume that the practice of punishment by the state is *in itself* both morally acceptable and morally irrefragable. This cherished *a priori* conviction in the morality of the institution of state punishment, however, is questionable on moral and state grounds; or, at least, so I would like to argue in this paper.[6]

This paper, therefore, focuses on the morality of punishment by the state and its justification as elaborated by Aquinas, Mill and Brentano. It is of course true that Brentano, Mill and Aquinas rely upon their own general theories of morality and the state at various stages in their defence of the state's moral justification(s) of punishment; so, some attention to these theories must be given too. Yet these general theories often cast obscurity rather than light on the issue of the state's moral justification of punishment *per se*. It is, then, of importance to distinguish first various general questions about morality, the state and the law that are of direct relevance to the understanding and evaluation of the state's justification of punishment from those that are not.

DISENTANGLING DIFFERENT QUESTIONS ABOUT LAW, MORALITY, AND THE STATE'S JUSTIFICATION OF PUNISHMENT

The relationship between law, morality, and the state's justification of punishment is both intricate and complex because it invites different questions on several different issues of legal and moral concern that are sometimes distinct and related, and sometimes distinct and unrelated. For instance, is a particular action that someone does, action "x", the morally right or wrong thing to do, in all cases, in some cases, or in this instance alone? This is one question and it concerns the evaluation of the morality of a given action whether such is permitted or prohibited by law.

[6] This paper is an extended version of a paper prepared and first read at an International Conference on "John Stuart Mill and the Positive Philosophy of the Nineteenth Century", hosted by the Department of History of Western Philosophy at The Institute of Philosophy and Psychology "Constantin Rădulescu-Motru" – Romanian Academy, on the 150th anniversary of John Stuart Mill's death (on-line: 19th–20th October 2023). I would like to express my thanks to the participants of the conference for their lively and critical discussion of this paper. I would also like to thank in particular Susan Krantz Gabriel for her proof-reading and comments on the penultimate written version and her remarks about politics and ethics in Aristotle, they were very helpful.

Is this law "a good law" is another question; but this question can refer to one of two things. It can refer either to (1.) the nature of the particular law itself as law, that is to say, to its *prudential framing*. It thus relates to such matters as whether the law is of a general nature, prospective (not retrospective), feasible, framed with reasonableness, compatible with other laws, not self-contradictive, enforceable, properly enacted through the legal system, promulgated, administered fairly and impartially, and so forth. Or, is this particular state law a good law can mean (2.) is *the course of action prescribed by this particular law* worthy of moral obligation? Is what the law enjoins one to do morally just, or unjust? This question concerns the moral evaluation of the substantive content of the particular law, and not its prudential framing. Since these are distinct things, Lon L. Fuller feels that it is of importance to distinguish what he calls "internal moral criteria" of law from "external moral criteria" of law, i.e., issues concerning the morality of the law that pertains to the internal nature or make-up of law itself as law or that which concerns the moral evaluation of the content of law. It is, nonetheless, precisely because of its nature as law, targeted at the good and framed with reasonableness, that Fuller can recognise and argue that one is (internally) morally, and not just legally obliged to respect the law, to have it administered fairly and impartially and so forth.[7] Thus, as David Lyons notes, "(T)here are moral limits to the obligation of fidelity to law, just as there are to other obligations – limits which depend on the moral quality of the law, its social history, current circumstances, and the consequences of applying it".[8]

There is, of course, a view (echoed above in Mill's passage) that morality is not, or should not be related to the law. This, however, is simply not the case. When we make a moral judgement about the wrongness of a given law or set of laws (e.g. Apartheid laws in South Africa), we are not concerned with interfering in the internal business of that state's function and its task and purpose to regulate behaviour of those who are subject to its laws. We are, rather, expressing a legitimate moral critique and demand that the state shape its laws in accordance with (our) basic moral convictions, such as those promoted, for instance, by natural (moral) rights.[9] No state or country is justified, morally speaking, in promoting racial discrimination, degradation, victimization and cruelty to fellow human beings. Law and morality, in other words, are both systems of evaluating the common good, but both do so in their own respective and legitimate ways, and, sometimes, the moral perspective stands over and above the state's perspective, no matter how those laws in a society are in fact found or appear to be socially or politically acceptable and legitimated via the state at any given time. The fact that slavery and the slave trade enabled the historical and economic development of

[7] Cf., Lon L. Fuller, *The morality of law*, New Haven, Yale University Press, 1964.

[8] David Lyons, *Ethics and the rule of law*, Cambridge, Cambridge University Press, 1984, p. 86.

[9] See, O'Donnell, "Legislation and morality", pp. 138–139.

Europe in the nineteenth century does not make it a matter of right. An absolute valid normative moral law cannot be derived from any matter of fact. "When Brentano", therefore, as one commentator succinctly remarks, "speaks of the 'origin' of moral knowledge he does not have in mind an explanation of its emergence, a genealogy of morals (Nietzsche) or of law (Ihering, of the historical school of jurisprudence), but rather the discovery of the authoritative source of this knowledge".[10]

The question of the legal enforcement of morality by the state is another question, and it is a very different question from all of the above questions. It concerns the issue, should the rightness or wrongness of an action that the law approves or prohibits *be the justification for the law*, for having law? Or, the question could be put differently as this. Is it the function or purpose of the law to enforce a moral viewpoint, to enforce *morality as such* and criminalise *immorality as such*? The "as such" is of importance in the debate about the legal enforcement of morality. The question whether the law should be used to enforce morality *as such* means for precisely those reasons, *and for no other reasons*, because this is the moral thing to do. Can we put forward the case that the law should be used to force people to do "x" and prohibit people doing "y" because doing "x" is the right thing and doing "y" is the wrong thing to do? Should a type of action be criminalised on the grounds that it is morally evil, or believed to be morally evil? Should a type of action be legislated for on the grounds that it is morally good, or believed to be morally good? This question is not to be confused with questions concerning either the moral evaluation of the substantive content of the law or the prudential framing of the law. It concerns rather the question of the proper relation of morality and the law.

Setting aside the issue of whether the law should be used to enforce morality *as such*, or not, even if you maintain that this is a proper function of law, and the law makes a law for moral reasons, the law cannot enforce the morality of that action, only the line of behaviour required of the individual or society to do or refrain from doing. Enforcing practices that are aimed at, for example, bringing about "natural justice", will still only result in the enforcement of the practices and not the morality of such practices because morality requires conviction and commitment to doing the right thing as an integral and essential component of any moral action, and *not just following a rule*. I cannot say that because the law is making me behave in a manner that is morally right, I am, therefore, behaving in a manner that is morally right, i.e., doing the right thing. This does not follow at all. One cannot act morally and automatically.

[10] Theodorus de Boer, "The descriptive method of Franz Brentano: Its two functions and their significance for phenomenology", in Linda L. McAlister (ed.), *The philosophy of Brentano*, London, Duckworth, 1976, pp. 101–7 (p. 102). See, also, Brentano, OKRW, "Criticism of Ihering", n. 45, pp. 93–96.

The question of the moral justification of the state's infliction of punishment on those who infringe state law is different from all of these issues raised above. Whether the law broken by the criminal is a good law or bad law, properly enacted or not, framed with reasonableness and administered fairly and impartially, or not, makes one moral, or not, is not the issue. The issue rather is this.

People who are found to have committed crime, broken the law of the state, are being taken against their will and some form of suffering or pain is inflicted upon them for the crime done by a publicly acceptable authority. The *deliberate* infliction of an *avoidable* pain or suffering on an individual for a crime done, however, is not self-justifying; it requires justification.[11] Why do this? What justifies this? Punishment, as a practice, requires justification. This is why, as Ted Honderich points out, "The general claim, that one cannot but regard punishment as in need of justification, is itself a judgement of a moral nature."[12]

It is of course true that state punishment is not only a widely accepted legal institution but also a widely cherished moral institution. What, however, gives the state the right to inflict punishment on those who infringe the law? Note that the issue here is not about the fairness (or otherwise) of the punishment of *innocent people* and the (alleged) benefits (or otherwise) of doing so by the state – one calls such acts or actions of the state, "miscarriages of justices", when later discovered. The issue rather is why *punish* the *guilty*?[13] What justifies this? Why is this considered a good? What is this good for? Why is this the right thing to do or believed to be the right thing to do? This is the issue that I wish to concentrate attention on for the remainder of this paper, it concerns the morality of state punishment *per se*. This issue does not, therefore, directly relate to the question of the proper relation of morality to law, or to the prudential framing or moral judgement of a law, but to the specific question of the morality of state punishment.

It is of course true, nonetheless, that the criminal law steps in precisely when and because the civil law is broken and has not achieved its purpose in the first instance for some of its subjects. In this regard, we cannot settle the issue of the criminal law without taking into account, in at least some general sense, the purpose of state law, even if commentators disagree in their deliberations regarding the purpose of the state. We know, for instance, that Brentano, broadly speaking, agrees with Aquinas's position on the purpose of state law and its relation to the natural moral law, and disagrees with J.S. Mill's views on the purpose of state law and its relation to issues of morality. Yet both Brentano and Aquinas give utilitarian justifications for the state's infliction of punishment in maintaining social cohesion and compliance to state laws, quite similar to J.S. Mill's position. Since Brentano agrees with Aquinas's views on morality and the law and the utilitarian justification

[11] See, Ted Honderich, *The supposed justifications of punishment*, London, Hutchinson, 1969; Cambridge, Polity, 1989, p. 11.

[12] Ibid., p. 12.

[13] See, Cyril McDonnell, "Why punish the guilty? Towards a philosophical analysis of the state's justification of punishment", in *Maynooth Philosophical Papers* 5 (2008), pp. 2–34.

of punishment by the state offered by Aquinas, no separate treatment of Mill's justification of punishment will be needed. Instead, I will concentrate on noting what Brentano seems to accept in Aquinas's general views on law, morality and punishment, whilst dealing in passing, when needs be for purposes of elucidation, with Mill's position on law, morality and the state's justification of punishment which Brentano opposes in principle yet accepts, at least in part, in practice in his defence of the morality of state punishment.

AQUINAS' GENERAL POSITION ON LAW, MORALITY AND THE MORALITY OF STATE PUNISHMENT OF MOST RELEVANCE TO BRENTANO'S ACCOUNT

In his discussion on the topic of law ("*De Lege*") in the *Summa Theologiae* (I-II, *Questiones* 90–97), Aquinas first identifies and collates several different concepts or kinds of "law" with which he was familiar and then endeavours to arrange all of these various kinds of law into a hierarchically-ordered system. Firstly, therefore, there is the overarching "eternal law of God" (q. 93) from which everything flows. God, as creator, creates all things and that includes all the laws governing his creation of all things that exist in the world and the universe. Things are as they are and will be, whether in present, past and future, as decreed by God in the eternal law of God. Within this eternal law, Aquinas recognises laws that are applicable to those living or inanimate things which cannot act with freedom (and reflective intelligence). These laws determine all things in the eternal law of creation *excluding the behaviour of the human being*, e.g., the law of gravity; the law of bird migration; the biological urge to procreate in any living animal, including the human being, to perpetuate its species. Even though Aquinas did not and could not understand such laws of nature in any modern natural-scientific sense, they are, nonetheless, understood by him as they are by Brentano in his day and as we do today in natural science, as descriptive of what *must* happen. Such laws are not prescriptive laws of what *should* happen, that is, laws of human behaviour. The latter rather is the concern of what Aquinas calls "the natural law" and "human law". Following Aquinas, Brentano thus distinguishes two main kinds of laws determining human behaviour: the natural-moral law and human-state law.

Regarding the first of these, the natural (moral) law, Aquinas notes that this law, unlike state law, is an unwritten law but one that is applicable to human beings as rational free beings who have a power to act, who can appreciate things and do things for the good or the bad. Metaphorically speaking, we can say that this law is "written in our hearts" (*lex tua scripta est in cordibus hominum*) as Augustine puts it and which Aquinas then notes, "but the law which is written in men's hearts is the natural law. (*Sed lex scripta in cordibus hominum est lex naturalis*.)"[14] The

[14] Aquinas, *ST* I–II, q. 94, art. 6.

natural law, in other words, as O'Donnell remarks, can be approached and described in many different ways: "a) From the point of view of its ultimate ground or source, one could describe it as the participation in the eternal law by a rational creature. b) From the point of view of its immediate source, one could describe it as the dictates of practical human reason, based on consideration of the nature of man and the situation in which he is placed by creation, concerning what man ought to do or avoid in order to attain his final end. c) Perhaps one could combine these viewpoints by describing the natural law as the dictates of practical human reason concerning those provisions of the eternal law which deal with rationally-controlled activity."[15]

This law, then, is one that we discover through reflection on our own *human* nature and discovering the ability we have to choose to do the right or wrong thing. For Aquinas,

> this is the first precept of [the natural-moral] law, that good is to be done and pursued, and evil is to be avoided. All other [secondary] precepts of the natural law [such as laws implemented by states, "human law"] are based upon this: so that whatever the practical reason naturally apprehends as man's good (or evil) belongs to the precepts of the natural law as something to be done or avoided.[16]

In this scheme of things, therefore, the natural (moral) law and human (state) law are distinct but related.

For Aquinas, nonetheless, the natural-moral law is, primarily, a law of a person's individual moral conscience pertaining immediately to what one subjectively regards as the morally right thing to do and wrong thing to avoid. Even if we find out later that our conscience was wrong, that is to say that what we thought was the right thing to do, was, in fact, discovered to be objectively the morally wrong thing to do, one is still bound to follow one's own (erroneous) moral conscience. The integrity of the human being as a moral person and of human ethical experience itself is thus affirmed by St Thomas as it is by Brentano.

In addition to (1.) the eternal law of God, (2.) natural-scientific law, (3.) natural-moral law, (4.) human-state law that is applicable to those living in a community or society subject to those laws, Aquinas recognises, in embryonic fashion, a concept of (5.) international law applicable between nations (*ius gentium*). Again, this follows from his Aristotelian conviction that the state is there for individuals and because each individual human being living in a state is to be treated justly as a human being, this extends to and includes the way nations interact with each other. Because international law follows from the (unwritten)

[15] Matthew O'Donnell, 'Memorandum on some aspects of the natural law' (May 1st 1963 unpublished), in M. O'Donnell, *Moral concern for society*, pp. 77–94 (p. 78).

[16] Aquinas, *ST* I–II, q. 94, art. 2: "bonum est faciendum et prosequendum, et malum vitandum."

natural moral law, such international law is universal and applicable to all human beings living in whatever format their state may take or can take in time and over time in their evolutionary and historical make-up. "This […] facet of natural law doctrine", therefore, as Scott Davidson remarks, "may be seen as containing the seeds of the natural rights idea that each person constituted an autonomous individual" and "[F]rom this it was possible to state that not only was the royal authority of monarchs constrained by divine rules, but that all human beings were endowed with a unique individual identity which was separate from the state."[17] In addition to all of these laws, Aquinas also recognises (6.) the "law of the household", that is, the regulation of family matters ("whose turn is it today to wash the dishes?"); (7.) the law of legal precedent; (8.) ecclesiastical law; (9.) military law; (10) mercantile law; (11) customary law; (12) criminal law; (13) the divine laws of the Old & New Testaments, and so forth. While some of these kinds of laws are clearly distinct and related, others are clearly distinct and unrelated as they concern different kinds of "objects" where, depending upon that object, that kind of law does apply or does not (such as, for instance, whether the law applies to atoms, animals, human beings as members of a household, as moral agents, or as members of a society etc.). The two particular kinds of law of most relevance to Brentano and to the moral justification of punishment by the state are the natural-moral law and human-state law. Both of these kinds of law, Brentano argues, in agreement with Aquinas, have their own respective domains of application and overlap.

Regarding the first principle of the natural-moral law, Aquinas notes that this does not (and cannot) specify (abstractly) which natural inclinations are morally good, to be followed, activated, nor which inclinations are bad, not to be followed, shunned. It is only from reflection on those inclinations that are in line with the fundamental moral principle – that good is to be done and evil avoided – that the morality of such inclinations for any given human being is determined and determinable. In this natural (moral) law theory, we cannot act morally and automatically, and no human being is superior, morally, to any other human being. The (moral) goal of the activity, the good aimed at, is what counts and what should count in the formulation (and repeal) of laws of the state, rather than distinguishing and identifying the morality of certain kinds of actions that should be legislated for or against. This, then, explains why, for Aquinas, virtuous acts are not exclusive to whatever natural inclinations any human may or may not have simply because "*not all virtuous acts* are prescribed by the *natural law*: for many things are done virtuously, to which nature *does not incline at first*; but which, *through the inquiry of reason*, have been found by human beings to be conducive *to well-living*."[18]

[17] Scott Davidson, *Human rights*, Open University Press, Buckingham, Philadelphia, 1993, p. 27.

[18] Aquinas, *ST* I–II, q. 94, art. 3, my emphasis.

Here, therefore, Aquinas recognises and acknowledges the existence of an area of the good and well-living that is to be evaluated and to be done that lies beyond the realm of one's own natural inclinations *per se* and yet conducive to the well-being of those individuals and society. Here, where one does not have the natural inclination toward "x" (which is good) but such is known and can only be known to be "conducive to well-living" via inquiry, that is, through experience and prudence – "trial and error" – these "goods" cannot be discovered (*ad-venire*) except through (*per*) the exercise of reason (*per industriam rationis*), and not by way of a natural inclination to the good or to reason (*inclinatio ad bonum, ad rationem)*.

Being alive, for example, is metaphysically good; so, whatever keeps you alive is to be pursued, ought to be done, a moral obligation; so, one has a right to self-preservation, e.g., to eat things, but what, or how much, or how little *should* one eat, that depends on circumstances and assessing whether such is undertaken in the pursuit of the good and avoidance of evil, or not. If, for example, we find out that consuming certain pesticides in food is bad for you, then we have no right to them and the state must forbid these and we must have good quality food produced; henceforth, the state has to "specify" and "evaluate", where possible, what is either a natural inclination toward the good of one's own being or what is known and evaluated to be, outside of our natural inclinations, conducive to our well-living. This will be a concern for human-state law as well as one's own individual metaphysical and moral well-being. It might be, for instance, a morally good thing to do, in some circumstances, to give your food to a starving child and not to yourself; but that would be a particular moral judgment on your part, not a requirement of state law, and one that lies in the domain of your moral conscience. Moral rules are not moral principles. Brentano, therefore, can remark that "Generally speaking, suicide is to be [morally] condemned. But there is one situation in which suicide is not only [morally] permissible, but it is also an act of [moral] virtue – namely, when a good yet higher than one's own life is in jeopardy".[19] Brentano's example is: "Rebecca, in Walter Scott's *Ivanhoe*, decides to throw herself into the abyss rather than to fall into the hands of the Templar; in so doing, she has the sympathy of the author and of any morally sensitive reader".[20] A higher good above any natural-metaphysical good or legal-state good can only be a natural-human *moral* good. Human life is a value, and one has the right to it, but this is not an absolute value, for, as O'Donnell argues, "in some circumstances, [the right to it] can cease or be overridden. It can thus be subordinated to the ultimate value, which is thereby affirmed by the sacrifice of the lower. Religious and political martyrdom would be instances".[21]

[19] Franz Brentano, "III. The relativity of secondary moral laws", Letter to the editor of the *Deutsche Zeitung* in Vienna (September 6, 1893), in Appendix, OKRW, pp. 116–118 (p. 117).

[20] *Ibidem*, p. 117.

[21] O'Donnell, "Aspects of natural law", p. 80.

Because Brentano agrees with Aquinas on "the relativity of secondary moral laws" to the (primary) natural-moral law, Brentano will never support a Millean-utilitarian consequentialist or Kantian deontological rule-based system in the justification of state law because such justifications can go against the first precept of the natural-moral law and the principles of natural justice to which the state is held accountable.

Likewise, the state, for Aquinas, is not morally obliged to protect one's individual right to religious freedom, if one's religious practice comes into conflict with the principles of natural justice upon which human-moral rights and the basis of state law are established. Aquinas, therefore, recognizes what he calls "human law" or state law as having its own proper domain of operation and justification that is linked to natural moral law and the inviolability of natural justice that lies outside of any particular religion or religious law, however much one has morally (or religiously) bound oneself to follow one's own subjective moral (or religious) conscience. And Brentano is quite right to note that this position "is in accord with the teachings not only of the most advanced science [of morality] but also of that religion which for centuries has been professed by the most advanced peoples – a religion that is ethically superior to all the others known to history. Christianity knows only *one* immediate supreme commandment, and it is this one commandment [of love] which gives validity to all the others. "'Upon it depends the law and all the prophets.'"[22] This is Brentano's way of defending the autonomy of morality and moral judgment from both religion and state because the commandment to love as the highest *moral good* is the only moral principle to follow.

Regarding the first precept of the natural-moral law, then, Brentano modifies Aquinas's position by maintaining "the only rule having unconditional, universal validity is the basic moral law – the law telling us that there are no circumstances under which we may choose anything *in preference to* the highest good".[23] This gloss by Brentano necessitates weighing preferences against love of the highest good (and the highest good of love), and so, fits into his particular moral theory that requires an experiential morally correct judgement taking into account the best possible moral world within the highest degree of probability where the actual consequences determine the morality of that action. In Brentano's estimation, then,

> It now seems to me that ethics is concerned with such decisions in the sphere of the emotions (*Gemütsentscheidungen*). It tells us that we must decide in accord with love that is experienced as being correct whenever such love is in conflict with our passions or with love that is not experienced as correct.
>
> In requiring that we make our decisions in this way, ethics also tells us how by reflecting we are to prepare ourselves for such decisions in cases

[22] *Ibidem*, pp. 117–118.
[23] *Ibidem*, p. 117.

> where the correctly qualified preference is not immediately given. We are to take note of what things considered in isolation are to be loved or to be hated, of what things are compatible with each other and what things not, and of what, under given conditions, is possible or impossible.[24]

It is, therefore, not surprising to find Brentano use this line of moral theorizing in his assessment of the state's moral justification of punishment, but (t)his theory, I will suggest, prevents him from analysing correctly the morality of punishment and its moral justification. Before addressing this, we can summarise for now the following.

Natural moral law differs from state law in that: it does not rely upon being made and unmade; it does not depend upon initiative; it is never abolished; it never changes. By comparison, state law is generated and depends upon human initiative; is made and unmade; is changeable; is never eternally true; differs from country to country; contains some laws that are somewhat or entirely arbitrary in terms of their morality but entirely practical in their functioning and necessity, e.g., traffic laws requiring one to drive on the left or right hand side of the road; contains some laws that include moral evaluation as part of the law's justification, e.g., against murder (unjust killing), otherwise, killings by state or by accident or in self-defence or by insanity could not be entertained, let alone ascertained.

Natural moral law and state laws can of course be disobeyed, whereas disobedience is irrelevant in natural-scientific laws. Natural-scientific laws are *descriptive* in character of the ways things are and must be. Natural moral law and state law are *prescriptive* in character of the way things ought to be done, whether or not it actually occurs or is done.

When Aquinas, therefore, refers to the various kinds of law, such as to the Eternal Law of God, the Natural-Moral Law, Human-State Law, Natural-Scientific Law, and the Law of the Household, etc., the term "law" (*lex/ ius*) is being stretched and used in very different ways and often in a metaphorical fashion. Since these laws nonetheless apply to different objects or things (atoms, dogs, human free actions), no analogical unity of meaning is present or can be present in their meanings or use. So, it is possible to read and interpret what Aquinas says about state law and human law, and their relatedness, on their own terms. Indeed, in his *analysis* of all the various kinds of law that he acknowledges and recognises, Aquinas picks out *the essential features* of what he considers to be the most complete definition of law which "is nothing else than [1.] an ordinance of reason, [2.] for the common good, [3.] made by him who has care of the community, and [4.] promulgated".[25] This is essentially a political-state definition of law, and it

[24] Franz Brentano, "II. Decisions within the sphere of the emotions and the formulation of the supreme moral commandment", Letter to Oskar Kraus (9 Sept, 1908), in Appendix, OKRW, pp. 113–116 (pp. 114–115).

[25] Aquinas, *ST* I–II, q. 90, art. 4.

follows Aristotle's location of ethics within politics in the *Politics* since politics, as a science, is concerned with evaluating the "good life" for its citizens (as individuals and members of that society).[26]

According to Aquinas, therefore, since the state's main purpose is to protect and create conditions of living for the common good for whomever is under its jurisdiction, it has to evaluate what is for the good of those particular individuals and society, and so, consider the primary precept of the natural-moral law "do good, and avoid doing harm", in its enactments of secondary precepts, moral rules that fill this in. *By definition*, then, for Aquinas, there can be no such thing as an "unjust" law of the state; in reality, however, there are unjust laws, and here Brentano is more the realist than Aquinas is because Brentano acknowledges and accepts *the existence of* "unjust", "bad laws" made by "governments" and by those charged with regulating human behaviour for the common good of its subjects. Thus, Brentano can argue that since "(T)hose who hold the power of government are also capable of making foolish and senseless decisions […] hence the state should not have all the power in its hands [… rather the] highest practical [moral] good is what must be decisive."[27]

Brentano, Aquinas and Aristotle, therefore, all agree with the old adage that "the state is a natural society" in the sense that "the state is the necessary source of supervision and coercion which are needed to ensure that the individual has a reasonable chance of achieving in society what (s)he can and should achieve".[28] If the state's government does not achieve this or bring this about, it can and should be replaced. In other words, preserving the state *as such* or society *as such* at the direct expense of those individuals living in the state or society is neither a moral nor state obligation for Aristotle, Aquinas or Brentano, for, as Brentano says, in agreement with Aquinas and Aristotle, "the state exists for man [the individual human being], not man for the state. The state exists only as a means; it is not good in itself."[29]

In all of this, then, Brentano is at one with Aquinas, and not with J.S. Mill's modern expression of the separation of morality and the state in *On Liberty* and the latter's view that only those actions that do harm to others and that have a detrimental effect on society's self-protection, that is to say, on *society as such*, justify state intervention in the lives of its individuals. So, where does punishment and the criminal law fit into this scheme of things and how is it related to the natural-moral law and human-state law for Aquinas and Brentano?

[26] Thus in conclusion to his discussion of the various kinds of law, Aquinas says we can regard the biological urge to procreate in animals as something that has "the nature of a law", but "only, however, insofar as a law may be said to be in such things". *ST* I–II, q. 91: in aliis quidem animalibus simpliciter habet rationem legis, illo tamen modo quo in talibus lex dici potest.

[27] Brentano, OKRW, n. 45, pp. 93–96 (p. 96).

[28] Matthew O'Donnell, "Revolution", in *The Maynooth Review*, 2 (1976), pp. 3–21 (p. 6).

[29] Brentano, "Epicurus and the war", p. 123.

AQUINAS, MILL, AND BRENTANO ON THE MORAL JUSTIFICATION OF STATE PUNISHMENT

Aquinas, Brentano and Mill all agree that the law takes the form of imperatives, of commands and orders, of "do's" and "don'ts". They are prescriptive of human behaviour. It is possible, nevertheless, to disobey the law. Thus the law itself does not bring along enforcement. It does not have any automatic in-built enforcement system of its own that it can use either to coerce or to encourage people to obey the law. Freedom is left to individuals to obey or not to obey the law. The law, therefore, seeks compliance in free choice. What, then, happens when people do not obey the law, break the law? What about crime? In response to this matter, Aquinas, Mill and Brentano all believe that punishment is necessary and that it has a morally justifiable role to play in the state's regulation of human conduct within its jurisdiction.

Turning to Aquinas, in matters relating to compliance to the laws of *the family household*, Aquinas remarks that "paternal training suffices, which is by admonitions." In these cases, paternal advice and admonitions (a "look" from your mum or dad!) is enough to "educate" the offspring; but not in all cases, e.g., a troublesome son or daughter, or serial killer. What is one to do then? "[S]ince some [human beings] are found to be depraved, and prone to vice, and not easily amenable to words, it was *necessary* for such to be restrained from evil by force and fear, in order that, at least, they might desist from evil-doing, and leave others in peace, and that they themselves, by being habituated in this way, might be brought to do willingly what hitherto they did from fear, *and thus become virtuous. Now this kind of training, which compels through fear of punishment, is the discipline of laws*."[30]

Fear of punishment leads to a *disciplina* (training) in keeping the law. The criminal law, therefore, is tied to law enforcement, and its justification is tied to its ability to achieve such law enforcement. It is, nevertheless, precisely "[B]ecause man can use his reason to devise means of satisfying his lusts and evil passions, which other animals *are unable to do*," that this being, Aquinas remarks, is capable of being *more dangerous to his fellow human being than any animal* in relation to fulfilling natural inclinations.[31] Thus the state needs both the actual threat and the carrying out of the actual punishment of such crime to thwart this as much as possible and to facilitate law compliance. It is of relevance to note, however, that according to Aquinas's own natural law theory, as one commentator remarks:

> An action is truly a moral one only if I perform it out of the conviction that it is good for human nature and *therefore* obligatory on me. Hope of extrinsic reward or fear of punishment is not a properly moral motive,

[30] Aquinas, *ST* I–II, q. 95, art. 1, my emphasis.
[31] *Ibidem*, my emphasis.

> however necessary it may be for public order. It detracts from the moral worth of an action, and if it is the only motive present it renders the action morally worthless.[32]

As Aquinas puts it, when anyone "refrains from evil deeds, through fear of punishment threatened by the law, and not from love of justice (*non amore iusitiae*)", then such acts of restraint and compliance, "do not fall under the [natural-moral] law (*non sunt sub lege*)" precisely because they are not done willingly in light of the good that the law seeks to bring about and promote.[33] Doing what is the (morally or legally) right thing to do, doing good, if the reason why one is doing this is from fear of punishment (or hope of reward), is not the proper moral motive for doing the right thing, doing good. Such extrinsic factors, if they impact on the individual, do not of course render such acts of law-compliance and restraint morally wrong, but they do not render them morally right either.

Brentano, nevertheless, agrees with Aquinas on the necessity of punishment for ensuring compliance to state laws, for, as he raises and answers his own question: "Why does the state punish people for breaking laws? Because only the threat of punishment *assures, or makes probable, compliance*. Hence the reason for establishing punitive measures is the same as the reason for issuing penal laws."[34]

Thus Brentano can argue that because "The most essential concern of the state is to safeguard the [natural] rights of property, life, honour, and the like; the protection of these goods is also the primary purpose of the criminal code".[35] How exactly, however, does the actual infliction of *punishment* on those who commit crime, who violate the rights of property, life, honour and the like achieve this, safeguard this?

That crime causes hurt, harm, theft of property, dishonour, damage, sometimes death, and unfair advantage over others in society is undeniable; but the infliction of punishment on the perpetrator does not make amends for such hurt, harm, damage, death, or unfair advantage gained. Punishment does not and cannot *restore* the situation back to that which went before the punishment has been meted out or threatened. The evil of punishment and the evil of the crime are incomparable units of evils – they are not comparable units for any theory of morality or probability calculus to weigh up. When it is said that punishment is *for* the crime, this can only mean one of three things. It can mean that punishment is (1) for the perpetrator of the crime, and for the perpetrator only; or it can mean, the amount of punishment that is to be "meted out" has to be (2) "proportionate" for the evil of the crime done, the severity of the punishment has to be equivalent to the severity of the

[32] James P. Mackey, *Life and grace. An essay in basic theology*, Dublin, Gill & Son, 1966, p. 88.

[33] Aquinas, *ST* I–II, q. 93, art. 3.

[34] Brentano, "IV. Punishment and its justification", in Appendix, OKRW, pp. 118–122 (p. 118), my emphasis.

[35] *Ibidem*, p. 119.

crime, the punishment has to match the crime (this comparison, however, is largely a metaphorical expression); or it can mean (3) punishment is a once-off thing, once you have been punished you cannot be punished again for the crime done; case closed; there is no continuing liability. What is wiped clean by the punishment is not the crime but your liability to be punished again. Punishment, in other words, does not do anything for the crime; it does something rather to the perpetrator of the crime (and perpetrator only) and to one's liability to be punished again and to the amount of punishment to be inflicted. In other words, the link between punishment and the crime is not real but largely mythical. Stripped of metaphors, such as "balancing the scales of justice", "wiping the slate clean", "annulling the wrong done", "removing a cancer from society", "paying a debt back to society", "restoring law and order", and so forth, punishment *is* retribution.[36] But is not punishment some kind of "back up" to law and order in society as Brentano and Aquinas argue?

That the justification of punishment is linked to law enforcement is an intelligible idea or proposition to hold, but it may not work as well as it is professed by those who support this theory. Brentano himself, for instance, presents many cases where it does not, as matter of fact, lead to compliance – but the question is, even if it did, is this a matter of right? "Even if, [Brentano remarks] generally speaking, suicide is morally blameworthy, it does not follow that the state should institute punishments for those who attempt it. If a man is prepared to take his own life, then he will hardly be deterred by the threat of punishment that the state might inflict. After all, the state considers the death penalty to be the most extreme punishment that there is."[37] Indeed, far from being deterred from such criminalisation of suicide, such a person may in fact be encouraged to take greater care to be successful in that endeavour, thus thwarting, as O'Donnell points out, the very purpose of the civil law and the state and "the goal of legislation".[38]

Whether punishment has a deterrent effect or not, punishment, therefore, *is* retribution, there is no other way of understanding it; and if it is to be morally justified the focus would have to fall here. Brentano assumes this and gives us the example of the punishment of a thief. Granting, as Brentano does, that "the degree of punishment was *suitable* as retribution", Brentano raises the question, "is it then [morally] permissible to go beyond this retribution and require him [the thief] to make restitution?"[39] Brentano thinks that this is *not justifiable* because "what we have here is not *punishment*, in the strict sense of the term".[40] You are to be punished, then, solely *because* you broke a law, for not complying to the law, for

[36] For a treatment of some of these metaphors, see, McDonnell, "Why punish the guilty? Towards a philosophical analysis of the state's justification of punishment", II Punishment as Spoken of in Metaphors, pp. 25–29.

[37] Brentano, "The relativity of secondary moral laws", p. 118.

[38] O'Donnell, "Legislation and morality", p. 139, 142.

[39] Brentano, "Punishment and its justification", p. 122, my emphasis.

[40] *Ibidem.*

your crime. So, Brentano has to conclude, "Does not the very concept of such a law [that is, of the criminal law as retribution tied to law non-compliance] contain the confession of an unjustified imposition?" This only follows if we take it *a priori* that punishment as retribution is not just definitionally or legally but morally justifiable by the state and that the threat of punishment or actual punishment *a priori* brings about law compliance, which it clearly does not as you are to be punished precisely because of your crime, because you have broken the law. You could argue that due restitution or recompense (not punishment) makes things better; that rehabilitation, reform, restraint and non-punitive deterrent measures have better chances of preventing future law-breaking than inflicting punishment. These non-punitive means would secure better protection and remedies of citizens wronged. And this would be more in accord with Brentano's own general moral theory and moral basis to the state than the institution of punishment which Brentano feels he has to justify. If Brentano is right, that "(I)t must not be forgotten that the state is not itself the supreme end. The state is only a means to higher goods. And when these are sacrificed in order to preserve the state, then the proper order of things is reversed",[41] then justifying *a priori and morally* the institution of state punishment to enable law compliance reverses the proper order of things between the state and morality as Brentano lays it out. This, of course, is not the conclusion that Brentano sees, or can see, or seeks to argue for, and that is because, it seems to me, that like Aquinas, Mill, and many others, Brentano has an *a priori* conviction that state punishment is *morally* justifiable. It is, however, precisely because punishment can do nothing about the crime that has been committed – what has been done cannot be undone – that the addition of "compensation for the damage done" is suggested and recommended by Plato in *The Laws*.[42] We could, however, take the punitive dimension out of punishment, and retain and institute alternative non-punitive measures. Cherished certainties that were once held in the past are by later generations (properly) challenged and called into question. Perhaps it is time today to call into question today's cherished certainty in the state's justification of punishment as a solution to crime, for until this solution is relinquished better (non-punitive) options aimed at improving "the good life" and lot of individuals and societies will not progress (morally speaking).

[41] *Ibidem.*

[42] Plato, *Laws*, 862D. The *Laws* was Plato's last work. In the *Laws*, Plato addresses the whole purpose of laws and lawgiving in great detail. His general policy on this matter is that "when anyone commits an act of injustice […], the law will combine instruction and restraint so that in the future either the criminal will never again dare to commit such a crime voluntarily, or he will do it a great deal less often: and in addition, he will pay compensation for the damage he has done". *Ibidem*.