

# THE CATHOLIC SECOND AMENDMENT

By David B. Kopel

## *Abstract*

*At the beginning of the second millennium, there was no separation of church and state, and kings ruled the church. Tyrannicide was considered sinful. By the end of the thirteenth century, however, everything had changed. The “Little Renaissance” that began in the eleventh century led to a revolution in political and moral philosophy, so that using force to overthrow a tyrannical government became a positive moral duty. The intellectual revolution was an essential step in the evolution of Western political philosophy that eventually led to the American Revolution.*

*This is a draft of a forthcoming article in the Hamline Law Review, to be published in 2006.*

## **Introduction**

In the middle of the eleventh century, a spark of human liberty was lit—a spark which would eventually kindle the American Revolution. This article explores how—as a result of the “Little Renaissance” that began in the eleventh century—Western legal, political, and moral philosophy rediscovered the ancient right to overthrow a tyrannical government.

Part I of this article summarizes the Dark Ages views about the Christian duty to submit to tyrants. Part II article details one cause of the intellectual revolution: the feudal principle of reciprocal contractual obligation between lord and vassal, and by extension, between government and the governed. Part III turns to the “Investiture Controversy” over whether Popes or the Kings had the right to appoint Bishops. The bitter struggles over investiture provoked many churchmen to scathing denunciations of various monarchs, and the denunciations destroyed the old notion that all kings were God’s anointed. Burgeoning cities, especially in northern Italy, used the church versus state conflicts as an opportunity to assert their own autonomy and liberty, which was safeguarded by the right to bear arms enjoyed by residents of the city.

Part IV examines the most influential Western book written between the sixth century and the thirteenth: *Policraticus*, authored by John of Salisbury around 1159. The book argued that kings, bishops, and even fathers could be tyrants when they abused their legitimate authority. According to *Policraticus*, tyrannicide against evil kings could be a moral obligation.

Part V studies the canon law (church law) and national legal codes which affirmed the individual’s natural right of self-defense and the government’s duty to obey

the law—and of the people’s right to depose a government which broke the law by infringing a person’s inalienable natural rights.

Part VI begins with the rediscovery of Aristotle, whose political writings showed the connection between liberty and the possession of arms; and the rediscovery of Justinian’s enormous *Corpus Juris* legal treatise. The intellectual examination of Aristotle and of the *Corpus Juris* led to the development of Scholasticism, a new method of philosophical analysis. The greatest of the Scholastics was Thomas Aquinas. Aquinas’s masterpiece, the *Summa Theologica*, explained that overthrowing a tyrant was a moral duty, because tyranny was itself a form of sedition against a justly-ordered society. Part VII outlines later developments in Catholic thought, and how Catholic ideas found their way to the American Revolutionaries, after being adopted by Protestant writers.

As the Dark Ages gave way to the Middle Ages, the use of force to resist a tyrant was changed from a sin into a holy obligation. Over five hundred years separate the European intellectual world that produced the *Summa Theologica* from the Americans who crafted the 1776 Declaration of Independence and the 1789 Second Amendment. Yet by the middle of the thirteenth century, the intellectual foundation for a right of revolution against tyranny—a right which Americans exercised in 1776 and safeguarded in 1789—had been solidly established.

## I. Dark Ages

During the Dark Ages (from the fall of the Western Roman Empire, until approximately the middle of the eleventh century), the fatalistic tendency was to view all political power as granted by God, to see rulers as above the law, and unaccountable to any human being; people were obliged to obey any and all rulers.<sup>1</sup> Proper temporal rule seemed of little importance, since the world was going to end in the year 1000, or perhaps in 1033, a thousand years after the death of Jesus.

The king was sacred, and even the most advanced thinkers of the Dark Ages believed in unlimited submission to government. For example, Archbishop Hincmar of Rheims (approx. 805-881 A.D.), an important advisor to King Charles the Bald of France, wrote a pair of treatises distinguishing a king (who assumed power legitimately and who promoted justice) from a tyrant (who did the opposite). Yet even Hincmar argued that even tyrants must be obeyed unquestioningly.<sup>2</sup> When Louis the German invaded France

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<sup>1</sup> P.D. King, *The Barbarian Kingdoms*, in *THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT* 128-29 (J.H. Burns, ed.) (1988). Hereinafter cited as *CAMBRIDGE MEDIEVAL*.

<sup>2</sup> *De Divortio* and *De Regis Persona*, discussed in Janet Nelson, *Kingship and Empire*, in *CAMBRIDGE MEDIEVAL*, at 217. Hincmar’s proof-text was from chapter 13 of St. Paul’s epistle to the *Romans*:

Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God. Whosoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation. For rulers are not a terror to good works, but to the evil. Wilt thou then not be afraid of the power? do that which is good, and thou shalt have praise of the same: For he is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to execute wrath upon him that doeth evil.

Wherefore ye must needs be subject, not only for wrath, but also for conscience sake. For this cause pay ye tribute also: for they are God’s ministers, attending continually upon

in 858, Hincmar remonstrated him with words from *Psalms*: “Thou shalt not touch the Lord’s anointed.”<sup>3</sup>

Kings were considered Christ on earth, and during coronation, the bishop would gird-on the king’s sword, symbolic of the king’s role in fighting the Church’s enemies.<sup>4</sup>

## II. Feudalism

The feeble Western Roman Empire had been conquered by barbarians in the fifth century.<sup>5</sup> After the fall of the Roman Empire, some relatively potent states had arisen, such Spain under the Visigoths or France under the Carolingian kings. But by the end of the first millennium, Gothic Spain and Charlemagne’s France were distant memories. The essential function of government, providing security against attack, was no longer provided by the employees of a king in a distant capital.

Instead, protection was provided by micro-government—by the lord of the nearest castle and a few knights in his service. That castle was the fortress into which the local community could retreat in case of attack. “All politics is local,” observed former U.S. House Speaker Tip O’Neill, and politics was especially local during the feudal age.

Because churches, monasteries, and convents were frequent targets of barbarian attack, they relied heavily on the local lord and his knights for protection. As a result, the church increasingly came under control of the micro-states.<sup>6</sup>

Under feudalism, all ownership of land was based on reciprocal obligation. The farmer received protection from the lord of the castle, and was obliged to give the lord a share of the farm’s produce. The lord would in turn hold his land in obligation to some greater lord. The lesser lord would pay his “rent” by providing military service (a certain number of knights and other fighters for a certain number of days) when called forth by the greater lord. The land-based, reciprocal obligations were inherited from one generation to the next. The obligations of “vassalage” ran up to the greatest landholders, who owned their land by feudal grant from the king.

Feudal obligations were created by mutual oath sworn before God. When kings ascended the throne, they too took feudal oaths, setting forth their obligations to the governed.<sup>7</sup> The foundation of civil society was reciprocal obligation.<sup>8</sup>

As Glanvill’s famous 1187 treatise on English law explained, when a lord broke his obligations, the vassal was released from feudal service.<sup>9</sup> If a party violated his duties

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this very thing. Render therefore to all their dues: tribute to whom tribute is due; custom to whom custom; fear to whom fear; honour to whom honour.  
Romans 13:1-7.

<sup>3</sup> Nelson, at 224-25; *Psalms* 105:15. The theory was that the prophet Samuel had anointed the Hebrew King Saul, and all Christian kings were successors of the Hebrew monarchs and of Jesus himself. They were therefore “the Lord’s anointed.” (*L’Oint du Seigneur*). DALE K. VAN KLEY, *THE RELIGIOUS ORIGINS OF THE FRENCH REVOLUTION* 17 (1996).

<sup>4</sup> Nelson, at 235.

<sup>5</sup> The name “Holy Roman Empire” was not used until 1254 A.D., but a Germanic state ruling much of Italy was far older.

<sup>6</sup> JAMES A. BRUNDAGE, *MEDIEVAL CANON LAW* 30 (1995).

<sup>7</sup> D.E. Luscombe, *Introduction: The Formation of Political Thought in the West*,” in *CAMBRIDGE MEDIEVAL*, at 162.

<sup>8</sup> Luscombe, at 160.

under an oath, and the other party suffered serious harm as a result, the feudal relationship could be dissolved *diffidatio* (withdrawal of faith).<sup>10</sup>

Historian Friedrich Heer explains that the *diffidatio* “marked a cardinal point in the political, social, and legal development of Europe. The whole idea of a right of resistance is inherent in this notion of a contract between the governor and the governed, between higher and lower.”<sup>11</sup>

Thus, another historian observes that modern society is founded on “one element...that can be directly traced to feudal origins: the notion that the relation between rulers and citizens is based on a mutual contract, which means that governments have duties as well as rights and that resistance to unlawful rulers who break their contract is legitimate.” Reciprocal feudal obligations “were the historic starting point of the limitation of the monarchy and the constitutional form of government, whose fundamental idea is that governments as well as individuals ought to act under the law.”<sup>12</sup>

### III. The Gregorian Reformation and the Investiture Controversy

In the Dark Ages, there was no separation of church and state, and it was the political class, not the priestly class, which held ultimate power in the church. Kings were often the head of the national church, and they appointed the bishops. Many bishops controlled vast feudal domains.<sup>13</sup> The church bureaucracy, with a near-monopoly on literacy, formed the backbone of local government in much of the West; so the power to appoint bishops amounted to the power to control much of the government.

Some bishops married, and their marital alliances solidified their ties to the royal regimes. Many bishops and priests were involved in corruption and violence, because they were appointed by politicians and were the friends and relatives of those politicians.<sup>14</sup>

Kings and their courts often made the final decision on disputes over church law and governance.<sup>15</sup> After the fall of the Western Roman Empire, the Papacy frequently had to contend, not always successfully, for independence from the Byzantine Emperor, or from closer rulers. By the end of the first millennium, the Holy Roman Empire ran the Papacy. (The Holy Roman Empire consisted of most of Germany, much of Italy, and a part of France; the Empire claimed to be the successor state to the Western Roman Empire.) The Holy Roman Emperor appointed the Pope, and deposed him if the Pope stepped out of line.<sup>16</sup>

Beginning in the eleventh century, the church began to re-assert its independence. In 1059, a Papal council declared that the Roman Cardinals, not the Holy Roman Emperor, would appoint the Pope. “Freedom of the Church” was the slogan.<sup>17</sup> In 1075,

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<sup>9</sup> HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 307 (1<sup>st</sup> pub. 1983)(1999 printing).

<sup>10</sup> BERMAN, at 306.

<sup>11</sup> FRIEDRICH HEER, *THE MEDIEVAL WORLD* 36 (1963)(1<sup>st</sup> pub. 1961 in Germany, as *Mittelalter*).

<sup>12</sup> R. Van Ceanegm, *Government, Law and Society*, in *CAMBRIDGE MEDIEVAL*, at 210.

<sup>13</sup> BERMAN, at 88.

<sup>14</sup> BERMAN, at 64.

<sup>15</sup> BERMAN, at 88.

<sup>16</sup> BERMAN, at 91.

<sup>17</sup> BERMAN, at 28.

Pope St. Gregory VII declared papal supremacy over the church, and further declared the church's independence from secular control.<sup>18</sup> In a series of *Dictatus Papea* (Dictates of the Pope), Pope Gregory went even further, asserting the Pope's power to depose emperors, and to absolve subjects of unjust rulers from their oaths of fealty to the ruler.<sup>19</sup>

Gregory VII started the Investiture Controversy, when he declared that no layman such as the Emperor could invest—that is, provide the vestments and the authority of office—for a bishop. Unsurprisingly, the monarchs refused to surrender their power of lay investiture. The result was a series of wars pitting the Holy Roman Empire against the Papacy and its allies. Pope Gregory VII announced the deposition of Holy Roman Emperor Henry IV, although the Pope did not succeed in forcing Henry off the throne.<sup>20</sup>

In the struggle with the Holy Roman Empire, the Popes of the latter eleventh century often allied with the Normans. The Normans, or “Northmen”, were descendants of Vikings, and were quite skilled at offensive war and sea-faring.

The Vatican and the Holy Roman Empire reached a compromise at the Concordat of Worms in 1122: the Pope would appoint the Italian bishops, and the Holy Roman Emperor would appoint the German ones.

Today in China and Vietnam, a new Investiture Controversy is underway. The Communist governments insist that all Catholic Bishops must be approved by the government. The Vatican adamantly refuses. At issue is whether the Catholic Church in China and Vietnam will be a church in service of world-wide Catholic beliefs, or a state church whose primary mission is to support the totalitarian government.<sup>21</sup>

Pope Gregory VII's “Papal Revolution” failed in its grand objective of uniting all Christian rulers under the Pope's leadership and control. Yet the Papal Revolution would change the world, helping to promote the intellectual shift that would eventually make possible the American Revolution. Legal historian Harold Berman summarizes:

The most important consequence of the Papal Revolution was that it introduced into Western history the experience of revolution itself. In contrast to the older view of secular history as a process of decay, there was introduced a dynamic quality, a sense of progress in time, a belief in the reformation of the world. No longer was it assumed that “temporal life” must inevitably deteriorate until the Last Judgment. On the contrary, it was now assumed—for the first time—that progress could be made in this world toward achieving some of the preconditions for salvation in the next.<sup>22</sup>

In addition, the Papal Revolution set off two centuries of conflicts between emperors and popes. The papal propaganda produced “a revolutionary breach of the continuity of European history; the transformation of the popular image of the Christian monarch from a sacred and sacrosanct figure into a diabolical object of execration.”<sup>23</sup>

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<sup>18</sup> BERMAN, at 87.

<sup>19</sup> BERMAN, at 96.

<sup>20</sup> Luscombe, at 171.

<sup>21</sup> Richard McGregor, *Faithful Freedom Fighter*, FIN. TIMES, July 19-20, 2003, at W3 (about Catholic Bishop Joseph Zen).

<sup>22</sup> BERMAN, at 118, 581 (explaining that Augustine had seen no hope for an improvement in conditions until the end of the world).

<sup>23</sup> HEER, at 331.

During the wars sparked by the Papal Revolution, various cities revolted against the rule of one of the parties.<sup>24</sup> In France and the Netherlands, towns forcibly asserted their liberties against ruling bishops who were subservient to monarchs; the municipal revolts were typically supported by groups loyal to the Papacy.<sup>25</sup> Other towns in the Western Europe also demanded their rights, and were given charters, grants, or other recognitions of rights from monarchs. Such rights might include limits on taxation, freedom for serfs who escaped to the town and lived there for a year, freedom of trade, the authority for a town to maintain its own courts and for townspeople not to be tried elsewhere, and freedom from feudal dues. Many of the towns were governed by popular assemblies or by elected councils.

Towns bore responsibility for their own defense, which meant that townsmen had the right to bear arms, and the duty to serve in the town's militia.<sup>26</sup> The Assize of Arms statute enacted by England's Henry II in 1181 required all townsmen to bear arms.<sup>27</sup>

In northern Italy, cities such as Genoa and Venice began seeking autonomy or independence from the Holy Roman Empire. Their most important ally was the Papacy, which was seeking to establish its own independence from the Holy Roman Emperor, and to expand its influence in Italy. Papal armies often fought in support of the cities. By the end of the thirteenth century, much of Italy had shaken off the Holy Roman Empire. Many cities, though, objected when the Pope imposed his own temporal rule on them. Urban revolts against Papal rule were common.<sup>28</sup>

In the conflicts between Popes and monarchs, the intellectuals who took the Popes' side argued that a king's obligation is to see that justice is done; if a king fails to do justice, then he is not a legitimate king. Advocates of this view included Peter Damian (1007-1072, a church reformer), Anselm of Lucca (1036-1086, a bishop allied with Gregory VII), Cardinal Humbert (1000-1061, an advisor to the reforming Popes), Bernold of St. Blaien, Bernold of Constance (1050-1100, a monk and historian), Cardinal Deusdedit (1040-1100), Bonizo of Sutri (1045-1090, a bishop and noted polemicist), and Honorius Augustodunensis (1080-1156, a prolific and popular author).<sup>29</sup>

Manegold of Lautenbach, a scholar at a monastery destroyed by the German Emperor Henry IV, wrote that the Pope had the authority to release subjects from their obedience to a ruler, as Pope Gregory VII had done.<sup>30</sup> Manegold analogized a cruel tyrant to a disobedient swineherd who stole his master's pigs, and who could be removed from his job by the master.<sup>31</sup> So:

[I]f the king ceases to govern the kingdom, and begins to act as a tyrant, to destroy justice, to overthrow peace, and to break his faith, the man who has taken the oath is free from it, and the people are entitled to depose the king and to set

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<sup>24</sup> *Id.*, at 97, 106.

<sup>25</sup> *Id.*, at 364-66.

<sup>26</sup> *Id.*, at 360, 386, 396-97.

<sup>27</sup> Statute of Assize of Arms, Hen. II, art. 3 (1181).

<sup>28</sup> SKINNER, *RENAISSANCE*, at 12-15, 143.

<sup>29</sup> Luscombe, at 172. Dates are approximate, and based on the "Biographies" section of *CAMBRIDGE MEDIEVAL*.

<sup>30</sup> Nelson, at 247.

<sup>31</sup> BERMAN, at 614-15.

up another, inasmuch as he has broken the principle upon which their mutual obligation depended.<sup>32</sup>

Compare Manegold's views with the American *Declaration of Independence*:

That to secure these rights, Governments are instituted among Men...That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government....

Manegold and Thomas Jefferson both claimed that rulers are contractually bound to protect the public good. Rulers who violate their duty thereby ceased to function as rulers; they might be removed, and replaced with others.

As far as we know, Jefferson never read Manegold. The idea articulated by Manegold, and elaborated by other Papal supremacists, was eventually transmitted to Jefferson and other American Founders by Protestant writers who were copying from the Catholics.<sup>33</sup> Although the Protestant writers abhorred the papacy, they freely built on the revolutionary theory which had been created by the Pope's strongest intellectual defenders.

#### IV. John of Salisbury and *Policraticus*

An amazingly (to modern sensibility) large amount of the debate about whether state was supreme over the church, or vice versa, centered on arguments over *Luke 22:38*. This was the passage from the Last Supper, in which Jesus had instructed the Apostles that from now on, they should carry swords. "Lord, here are two swords," they responded.

There was no dispute over the literal historical truth of the story—that is, Jesus told his followers to carry swords, and they showed him the swords they would carry.<sup>34</sup> However, the passage was also considered to have tremendous symbolic implications. One sword was secular power, the other sword was spiritual power.

Pope St. Gelasius I (492-96) introduced the Two Swords symbol during an argument with Byzantine Emperor Anastasius I. The Pope declared "There are two powers by which chiefly this world is ruled: the sacred authority of the priesthood and the authority of kings. And of these the authority of the priests is so much the weightier...."<sup>35</sup> Over eight hundred years later, the Two Swords idea was still prominent in political debate. 1302, Pope Boniface VIII issued the Bull *Unam Sanctam*, cited the two swords doctrine, and then claimed that the spiritual sword be superior to the temporal one.<sup>36</sup>

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<sup>32</sup> 4 A.J. CARLYLE & R.W. CARLYLE, *MEDIEVAL POLITICAL THEORY IN THE WEST* 164 (1950), translating and paraphrasing Manegold's Latin text in *Liber Ad Gebehardum* (1085).

<sup>33</sup> See text at notes - .

<sup>34</sup> J.A. Watt, *Spiritual and Temporal Powers*, in *CAMBRIDGE MEDIEVAL*, at 370

<sup>35</sup> BERMAN, at 279; *Pope St. Gelasius I*, *NEW ADVENT CATHOLIC ENCYCLOPEDIA*, [www.newadvent.org/cathen/06406a.htm](http://www.newadvent.org/cathen/06406a.htm). The secular power was the *regalis potestas* and the spiritual power was the *auctoritas sacrata pontifica*.

<sup>36</sup> 1 QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* 15 (2002)(1<sup>st</sup> pub. 1978). Hereinafter, SKINNER, *RENAISSANCE*. Full text of *Unam Sanctam* at [www.shrine.com/Unam.htm](http://www.shrine.com/Unam.htm).

Critics of Papal supremacy denied that the Pope held both swords, or that he held any swords, or that the spiritual sword was superior to the secular one.<sup>37</sup>

The Two Swords debate was a dispute between two types of rulers about which one had supreme power. But the dispute was transcended when the best-selling book of the twelfth century, *Policraticus*, changed the topic, and argued that the fundamental question was not who had supreme power, but instead the people's remedies when any ruler exceeded his rightful powers or failed to perform its duties.

The most important political philosopher of the twelfth century was John of Salisbury, whose 1159 *Policraticus* ("Statesman's Book") was the first serious book of political science in the West for many centuries. John of Salisbury was a cosmopolitan and very well-educated English bishop.<sup>38</sup> He was "the most accomplished scholar and stylist of his age."<sup>39</sup>

*Policraticus* was perhaps the most influential book written since the Byzantine Emperor Justinian's legal treatise *Corpus Juris* had been compiled six centuries before. The book "created an immediate sensation throughout Europe."<sup>40</sup> "For over a century *Policraticus* was considered throughout the West to be the most authoritative work on the nature of government"; Thomas Aquinas, whose work later displaced Salisbury, consciously built on Salisbury's foundation.<sup>41</sup> Throughout the Middle Ages, John of Salisbury's "writings were extensively studied and repeatedly pillaged by jurists, preachers, reforming barons and humanists."<sup>42</sup>

As an English bishop, John of Salisbury saw first-hand the tremendous Church vs. State struggle in England. King Henry II (1154-1189) was determined to rule the church. *Policraticus* did not mention Henry II by name, but the book was dedicated to Thomas Becket, the great English bishop with whom Salisbury served for many years.

*Policraticus* was published around 1159, as the English struggle was intensifying. In 1162 the King appointed Thomas Becket as Archbishop of Canterbury, the highest position in the English church. In 1164, King Henry forced Becket and other leaders to proclaim the Constitutions of Clarendon, which reasserted extensive royal authority over the church. Because the Constitutions of Clarendon were contrary to canon law (church law, discussed *infra*), Becket later repudiated the Constitutions. He publicly declared that King Henry was usurping power.

A bitter conflict ensued, and in 1170 an enraged Henry roared, "Will no one rid me of this pestilential priest?" Four knights heard the King's remarks, and promptly rode off to assassinate Becket, at Canterbury Cathedral. (The story is retold in T.S. Eliot's play *Murder in the Cathedral*.) Eleven years after *Policraticus* was published, John of Salisbury was present in Canterbury Cathedral when Becket was murdered.<sup>43</sup>

The murder of Becket horrified public opinion in England and the Continent, and Henry accurately saw that his throne was in grave danger. He did penance, allowing

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<sup>37</sup>I.S. Robinson, *Church and Papacy*, in CAMBRIDGE MEDIEVAL, at 302-05; D.E. Luscombe & G.R. Evans, "The Twelfth-century Renaissance," in CAMBRIDGE MEDIEVAL, at 317-20; Watt, at 370-75, 380-83, 411; BERMAN, at 92-93.

<sup>38</sup>R. Van Ceanegm, *Government, Law and Society*, in CAMBRIDGE MEDIEVAL, at 208.

<sup>39</sup>DAVID KNOWLES, *THE EVOLUTION OF MEDIEVAL THOUGHT 135* (1962), *quoted in* BERMAN, at 161.

<sup>40</sup>BERMAN, at 276.

<sup>41</sup>BERMAN, at 278-79.

<sup>42</sup>Luscombe & Evans, at 325-26.

<sup>43</sup>BERMAN, at 612-13.

himself to be scourged by some monks. The King worked out a compromise with the Church in which he revoked the Constitutions of Clarendon, and was allowed to claim that he never wanted Becket killed, but he did take responsibility for indirectly inciting Becket's death by proclaiming the Constitutions in the first place.<sup>44</sup>

Even before Becket's death, *Policraticus* was the bestseller of the century. The author's personal witness to the most infamous tyrannical crime of the twelfth century doubtless caused even more interest in what John of Salisbury had to say about resistance to tyranny.

The book was a shot at contemporary monarchs who oppressed the Catholic Church: Holy Roman Emperor Frederick Barbarossa (the *teutonicus tyrannus*), Roger II (the harsh Norman king of Sicily), Stephen of Blois (who ruled England, more or less, from 1136 to 1154 after starting a civil war to usurp the throne from his cousin Matilda, and who plundered the church and threw bishops in prison), Eustace (Stephen's son, who was killed while pillaging the abbey of Bury St. Edmunds), and Henry II (Matilda's son).<sup>45</sup>

"All tyrants reach a miserable end," John announced. For proof, he pointed to contemporary examples, such as Eustace, Geoffrey de Mandeville (the plundering Earl of Essex, who was killed in 1144), and Ranulf of Chester (another participant in the Stephen/Matilda war, killed in 1153). And then there were many stories from the past: the anti-Christian Roman Emperor Julian the Apostate was said to have been stabbed to death with a lance by the martyr Mercurius "on the command of the Blessed Virgin." The Danish tyrant Swain, who imposed the Danegeld (a tax) on the British was slain by "the most glorious martyr and king Edmund." And "Where is Marmion [another contemporary Briton] who, pushed by the Blessed Virgin, fell into the pit which he had prepared for others? Where are the others whose mere names would consume a book? Their wickedness is notorious, their infamy is renowned, their ends are unhappy..."<sup>46</sup>

Citing Biblical examples, John explained that "one may frequently kill and still not be a man of blood nor incur the accusation of murder or crime." Pointing to King David and the prophet Samuel, he wrote, "This is indeed the sword of the dove, which quarrels without bitterness, which slaughters without wrathfulness and which, when fighting, entertains no resentment whatsoever."<sup>47</sup>

He explained that a good Christian should not be expected to obey the law or a superior's order in all circumstances, for "Some things are...so detestable that no command will possibly justify them or render them permissible." For example, a military commander might order soldiers to deny the existence of God or to commit adultery.

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<sup>44</sup> The offending clauses of the Constitution of Clarendon were removed by the King at Avranches, on May 21, 1172. The King surrendered his claim that temporal courts could hold criminal trials of clerics. Clerics remained criminally liable to temporal courts for alleged breaches of the forest law—that is, for poaching in the forests, which the king controlled as a private hunting preserve. WILLIAM STUBBS, *SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY* 163 (rev. & ed. H.W.C. Davis)(Oxford: Clarendon Pr., 1957 9<sup>th</sup> ed.)(1<sup>st</sup> pub. 1870).

<sup>45</sup> Luscombe & Evans, at 328.

<sup>46</sup> JOHN OF SALISBURY, *POLICRATICUS*, transl., Cary J. Nederman (1990)(1<sup>st</sup> pub. approx. 1159), book 8, ch. 21. Julian reigned from 361 to 363. Julian may have been killed by one his own soldiers, either accidentally or on purpose. St. Mercurius (a/k/a Merkourios) was said to have done the deed posthumously, since he was a soldier who had been martyred for his Christian beliefs decades earlier.

<sup>47</sup> JOHN OF SALISBURY, book 4, ch. 2, at 31.

Similarly, if a prince “resists and opposes the divine commandments, and wishes to make me share in his war against God, then with unrestrained voice I must answer back that God must be preferred before any man on earth.”

John argued that intermediate magistrates, such as local governors, had a duty to lead forcible resistance if necessary, against serious abuses by the highest magistrate, such as the king.<sup>48</sup>

Interestingly, the theory that “inferior magistrates” were not always bound to obey the supreme magistrate was also developing in canon law; many bishops were claiming that they were not in all circumstances required to obey the Pope.<sup>49</sup>

*Policraticus* drew heavily on Bible stories, and on examples from ancient Rome. John announced “That by the authority of the divine book it is lawful and glorious to kill public tyrants....”<sup>50</sup>

Not since the fall of Rome had any Western writer provided a detailed theory of tyrannicide.<sup>51</sup> *Policraticus* made tyrannicide a positive duty:

[I]t is not only permitted, but it is also equitable and just to slay tyrants. For he who receives the sword deserves to perish by the sword.

But ‘receives’ is to be understood to pertain to he who has rashly usurped that which is not his, not he who receives what he uses from the power of God. He who receives power from God serves the laws and is the slave of justice and right. He who usurps power suppresses justice and places the laws beneath his will. Therefore, justice is deservedly armed against those who disarm the law, and the public power treats harshly those who endeavour to put aside the public hand. And, although there are many forms of high treason, none is of them is so serious as that which is executed against the body of justice itself. Tyranny is, therefore, not only a public crime, but if this can happen, it is more than public. For if all prosecutors may be allowed in the case of high treason, how much more are they allowed when there is oppression of laws which should themselves command emperors? Surely no one will avenge a public enemy, and whoever does not prosecute him transgresses against himself and against the whole body of the earthly republic.<sup>52</sup>

So a tyrant was a traitor against the law and justice, and therefore was the worst of all enemies of the public. In sum, “As the image of the deity, the prince is to be loved, venerated, and respected; the tyrant, as the image of depravity, is for the most part even to be killed.”<sup>53</sup> Therefore, tyrannicide was “honourable” when tyrants “could not be otherwise restrained.”<sup>54</sup>

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<sup>48</sup> JOHN OF SALISBURY, *Policraticus*; DOUGLAS F. KELLY, *THE EMERGENCE OF LIBERTY IN THE MODERN WORLD: THE INFLUENCE OF CALVIN ON FIVE GOVERNMENTS FORM THE 16<sup>TH</sup> THROUGH 18<sup>TH</sup> CENTURIES* 30 (1992).

<sup>49</sup> K. Pennington, “Law, Legislative Authority and Theories of Government, 1150-1300,” in *CAMBRIDGE MEDIEVAL*, at 453.

<sup>50</sup> JOHN OF SALISBURY, book 8, ch. 20, at 206 (chapter heading).

<sup>51</sup> BERMAN, at 282.

<sup>52</sup> JOHN OF SALISBURY, book 3, ch. 15, at 25.

<sup>53</sup> *Id.*, book 8, ch. 17, at 191.

<sup>54</sup> *Id.*, book 8, ch. 18, at 205.

There were two limits: First, poison could not be used. Second, a person could not rebel against a person to whom he legally owed fealty.

The political theory of the Dark Ages had insisted that obedience to God required obedience to any ruler, no matter how awful. John of Salisbury turned the theory on its head: “it is just for public tyrants to be killed and the people to be liberated for obedience to God.”<sup>55</sup> Compare this line to the words which Thomas Jefferson and Benjamin Franklin proposed placing on the Great Seal of the United States: “Rebellion to tyrants is obedience to God.” The words were the motto of John Bradshaw (1602–1659), the lawyer who served as President of the Parliamentary Commission which sentenced British King Charles I to death.

At great length, *Policraticus* denounced tyranny and justified tyrannicide. A few passages did counsel patient reliance on deliverance by God, warned against taking drastic actions based on small or isolated offenses, and urged prayer as the method of ending tyrannical oppression. The cautionary lines, however, did not undermine the revolutionary impact of the book.

Going beyond political tyranny, John of Salisbury explained that tyranny could occur in many forms; “many private men are tyrants.”<sup>56</sup> “[E]veryone is tyrant who abuses any power over those subject to him which has been conceded from above.”<sup>57</sup> A father, a land-owner, or a merchant could be a private tyrant, if he abused his power.

An ecclesiastical tyrant was a priest, bishop, or other church official who misused his power, harming rather than protecting the people in his spiritual care.<sup>58</sup>

One of the problems of the tyranny of petty officials was that it was illegal to resist their depredations, even though “it is otherwise lawful to repel force with force without blame if one has safeguarded moderation.”<sup>59</sup> However, tyrannicide was appropriate for only actual rulers of governments, not for private tyrants.<sup>60</sup>

While Britain’s John of Salisbury became the most famous exponent of the right of revolution, the idea was catching on in other nations too. The Parisian teacher Robert of Melun wrote an exposition of Paul’s epistles, and said that a tyrant does not act with lawful, potent power, but instead acts impotently.<sup>61</sup>

Azo (1150-1230), a renowned professor of Roman law at the University of Bologna, made similar points: lesser magistrates held a share of the sovereignty; the king’s *imperium* was no larger than his *iuridictio* (legitimate authority); when a king exceeded his lawful authority and thereby became a tyrant (*rex tyrannus*), the subjects had a right and a duty to kill him.<sup>62</sup>

In Aragon (a kingdom comprising about half of modern Spain), a well-known legal maxim stated that subjects should obey a king when he performs his duties, “and if not, not.”<sup>63</sup>

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<sup>55</sup> *Id.*, book 8, ch. 20, at 207.

<sup>56</sup> *Id.*, book 8, ch. 17, at 191.

<sup>57</sup> *Id.*, book 8, ch. 18, at 202.

<sup>58</sup> *Id.*, book 8, ch. 23.

<sup>59</sup> *Id.*, book 6, ch. 1, at 108. The phrase about repelling force with force came from Justinian’s *Corpus Juris*. See ch. 9.

<sup>60</sup> JOHN OF SALISBURY, book 8, ch. 18, at 205.

<sup>61</sup> Robert of Melun, *Quaestiones de Epistoles Pauli*, discussed in Luscombe & Evans, at 317.

<sup>62</sup> BERMAN, at 407; KELLY, at 30.

<sup>63</sup> BERMAN, at 293.

## V. Canon Law

The Little Renaissance began in the mid-eleventh century and reached its climax in the twelfth century. Much of the Western world began to lift itself from the ignorance and squalor that of the preceding six centuries. Universities were established in Oxford and Paris. The administration of law and of law-making was regularized by the creation of written laws and the diffusion of literacy.

In the long run, the Little Renaissance—especially the renaissance in law—contributed greatly to the right of revolution. By the time of the American Revolution, the New England ministers viewed God’s relationship with his people in contractual terms, governed by natural law and justice. And if God had to govern pursuant to contract, and according to natural law and justice, so did government. If a government failed to do so, its subjects were no longer bound to obey.<sup>64</sup>

Around 1140, Gratian of Bologna brought together numerous, scattered sources to compile what became the unified foundational text of canon law (church law): the *Decretum*, also called the *Corpus Discordantium Canonum* (the body of discordant canons). Canon law became the foundation of the modern Western legal system in Europe.

### A. The Natural Right of Self-Defense

Gratian’s *Decretum* relied heavily on natural law, which Gratian argued was universally applicable. “Natural law is common to all nations because it exists everywhere through natural instinct, not because of any enactment.”<sup>65</sup> Examples of natural law including “the union of men and women, the succession and rearing of children,...the identical liberty of all,...the return of a thing deposited or of money entrusted, and the repelling of violence by force. This, and anything similar, is never regarded as unjust but is held to be natural and equitable.”<sup>66</sup>

In other words, the right of self-defense was not a right that was enacted by governments and granted to the people. The right was inherent in the natural order of the world, and the right existed everywhere. The principle of a natural right of self-defense was pervasive among the American Founders. The Founders viewed resistance to tyranny

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<sup>64</sup> See David B. Kopel, *The Religious Roots of the American Revolution and the Right to Keep and Bear Arms*, 17 J. FIREARMS & PUB. POL. (2005).

<sup>65</sup> GRATIAN, THE TREATISE ON LAWS (DECRETUM DD. 1-20) WITH THE ORDINARY GLOSS, transl., Augustine Thompson & James Gordley (Washington: Catholic University Press of America, 1993), Distinction One, case 7, § 2, at 6.

<sup>66</sup> GRATIAN, Distinction One, case 7, § 3, at 6-7; Janet Coleman, “Property and Poverty,” in CAMBRIDGE MEDIEVAL, at 617. Gratian was quoting St. Isidore of Seville (approx. 560-636 A.D.), a Spanish theologian and author of the encyclopedia *Book of Sentences and Etymologies* (also called *Origines*). BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS 142 (1997).

Isidore also repeated a proverb: “Kings are so called by their ruling...Therefore by doing rightly the title of king is kept, by wrongdoing it is lost.” Gabriel Palmer-Fernandez, *Tyrannicide, Medieval Catholic Doctrine of*, in ENCYCLOPEDIA OF RELIGION AND WAR 434 (ed., Gabriel Palmer-Fernandez) (2004). As Isidore shows, Dark Ages thought was not unanimous in favoring submission to tyranny. He was extremely influential on medieval thought, and is regarded as the last of the Fathers of the Church in the West. Michael P. McHugh, *Isidore of Seville*, in ENCYCLOPEDIA OF EARLY CHRISTIANITY 593 (ed., Everett Ferguson)(2d ed. 1998).

was seen simply as an application of the right of self-defense, which was a natural right regardless of whether a person was attacked by a lone criminal, or by a large criminal gang, in the form of a tyrannical government.<sup>67</sup>

The national that the right of self-defense, and the corollary right to defensive arms, are natural rights was expressed by the United States Supreme Court in the 1875 case *United States v. Cruikshank*, involving Congressional powers under the Fourteenth Amendment.<sup>68</sup> Regarding the First Amendment, the Court wrote:

The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It “derives its source,” to use the language of Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 211, “from those laws whose authority is acknowledged by civilized man throughout the world.” It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection.

A few pages later, the Court made the same point about the right to arms as a fundamental human right:

The right. . . of bearing arms for a lawful purpose. . . is not a right granted by the Constitution. Neither is it in any manner dependent on that instrument for its existence.

Thus, the Bill of Rights protected Americans against congressional interference with the pre-existing human rights recognized in the First and Second Amendments. However, if a mere private individual interfered with another private individual (preventing the other individual from assembling or from bearing arms), the Bill of Rights had nothing to say on the matter. The Bill of Rights legally restrained the federal government, and no-one else.<sup>69</sup>

Gratian’s collection gave canon lawyers the necessary tool to begin more rigorous analysis of legal principles and difficult cases. The canon lawyers became sophisticated in assessing a person’s intent as part of his criminal culpability. “Direct intent” (such as when a person stabbed another for the purpose of killing him) was distinguished from “indirect intent” (such as when a person knew that a result would occur but had no wish to accomplish the result—for example, if a prisoner killed a guard in order to escape, but had no particular desire for the guard to be dead).<sup>70</sup>

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<sup>67</sup> Kopel, *supra*.

<sup>68</sup> *United States v. Cruikshank*, 92 U.S. 542 (1875). The case is discussed in much more detail in DAVID B. KOPEL, ALAN KORWIN & STEPHEN P. HALBROOK, *SUPREME COURT GUN CASES* 136-37 (2003).

<sup>69</sup> *Cruikshank*.

<sup>70</sup> GRATIAN, at 188.

## B. The Implications of the Natural Right of Self-Defense

The saying that “The church lives by Roman law” (*ecclesia vivit lege Romana*) acknowledged the great importance of Justinian’s *Corpus Juris* in canon law.<sup>71</sup> The *Corpus Juris* had recognized the right of self-defense, and so did the canon law. Echoing the *Corpus Juris*, the canon lawyer Raymond of Pennaforte wrote, “it is always lawful to meet force with force.”<sup>72</sup> Pope Innocent IV declared, “It is lawful for every man to move war in defense of himself and his goods.”<sup>73</sup> As Oxford historian M.H. Keen later noted, “In a society in which large scale violence was an everyday problem, it was essential for the individual to be guaranteed a right of self-defence...”<sup>74</sup>

Jesselin de Cassagnes was a judge at a Papal court in Avignon, France—a city where medieval Popes often moved their headquarters when the political situation in Rome became untenable. De Cassagnes explained that even the powers of an absolute emperor were finite. The Emperor could deprive a subject of things that the subject had received under positive law (such as a grant of property from a previous emperor). But no emperor could deprive a subject of anything the subject owned by virtue of natural law. Thus, no emperor could take away a subject’s right to self-defense, or the subject’s right to repel force with force.<sup>75</sup>

Like Justinian’s *Corpus Juris*, canon law discouraged most forms of self-help for people who had wrongfully been dispossessed for their lands, as long as legal remedies were available.<sup>76</sup>

Canon law strongly favored the absolute right of a property owner to use his property as he wished, as long as he did not harm his neighbors. Taxation without consent was condemned as tyrannical. Should a ruler attempt to take a subject’s property, the subject had every right to resist forcefully.<sup>77</sup>

Andraea Johannes, an early fourteenth century canon lawyer, used the right of resistance—which Aristotle had said was inherent in all free polities—to develop

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<sup>71</sup> BRUNDAGE, at 111.

<sup>72</sup> RAYMOND OF PENNAFORTE, *SUMMA*, book 2, ch. 5, § 18, quoted in KEEN, at 67.

A much-discussed canon law case was decided by Pope Alexander III. Some robbers broke into a monastery, hit two monks and rendered them unconscious, and stole their clothes. The monks awakened, and subdued the robbers, and tied them up. While one monk went to inform his superior, the second monk guarded the two robbers. The two tied-up robbers began to escape from their bonds, whereupon the guardian monk killed them in order to prevent them from killing him.

Pope Alexander issued a Decretal holding that the monks had committed criminal sins by tying up the robbers and by killing them. The Pope cited Jesus’s admonition that if a man asks for your cloak, you should give him your coat as well.

Some canon law scholars interpreted the Decretal as standing for the general principle that clerics could not use force in self-defense. Others interpreted the case as turning on the fact that the monks could not invoke the general right of self-defense, because once they had regained consciousness, they could have escaped without tying up the robbers. And since tying up the robbers was wrong, they could not invoke the right of self-defense in a situation that sprang from the wrongful tying. BERMAN, at 190-91.

<sup>73</sup> Innocent IV, *In V Libros Decretales Commentaria*, 2 Decretales, Rub. 13, ch. 12, quoted in KEEN, at 67.

<sup>74</sup> KEEN, at 68.

<sup>75</sup> Pennington, at 192.

<sup>76</sup> BERMAN, at 244.

<sup>77</sup> Brundage, at 80-81.

advanced principles of due process, including presumption of innocence, the right to public trial, and the right regular procedures in court.<sup>78</sup>

### C. The Rule of Law

To an English or American audience, the phrase “rule of law” signifies the obligation of the government to obey the law, and to follow only lawful procedures. In Japan, however, “rule of law” merely signifies the individual’s obligation to obey the government.<sup>79</sup> One of the very distinctive features of the Western legal tradition is that it places the government under the law. And because Western law is founded on canon law, it is canon law that is the source of this idea.

Gratian wrote: “It is just that the prince be restrained by his own ordinances.”<sup>80</sup> Further, the prince was restrained by natural law, even if the natural law were not codified in a positive ordinance. The canon lawyer Andreas de Isernia similarly wrote that “the Prince cannot do anything which is contrary to natural law, because it is immutable.”<sup>81</sup> Medieval law relied heavily on Roman law (discussed *infra*). The prestige of Roman law reinforced the principle of the rule of law. Steven Calabrisi explains:

Because Roman law, as developed by university law professors, became a superior source of authority in private law to either what kings or popes thought the private law should be, those kings, pope and other high government officials and church officials were subordinate to the law.<sup>82</sup>

The battle to establish the rule of law, to create governments which genuinely were restrained by law, took many centuries in the West, and that battle has not been won with finality.

The very existence of the principle of the rule of law, however, had drastic implications for the developing right of revolution. It gave people a guideline for seeing when their rulers were no longer functioning as a legitimate government: when the rulers no longer obeyed the law. John of Salisbury was among the many authors who relied on the rule of law principle to distinguish tyranny from lawful government. In the long run, the rule of law principle helped people understand that removing a tyrant was restoring the law, not undermining the law.

Although laws were promulgated by church or secular authorities, it was believed that “God is the source of all law.” Like the Hebrews who revered the *Torah*, the Christians of Middle Age were just the opposite of legal positivists. They did not believe that law was a mere creation of human societies. Instead, true law came from the true

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<sup>78</sup> KENNETH PENNINGTON, *THE PRINCE AND THE LAW 1200-1600: SOVEREIGNTY AND RIGHTS IN THE WESTERN LEGAL TRADITION* 162-63 (1993).

<sup>79</sup> N. Urabe, *Rule of Law and Due Process: A Comparative View of the United States and Japan*, 53 L. & CONTEMP. PROBS. , 69 (1990).

<sup>80</sup> GRATIAN, *Distinction Nine*, case 2, at 29.

<sup>81</sup> Andreas de Isernia, *In Usus Feudorum Commentaria*, book 2, title 56, quoted in H. KEEN, *THE LAWS OF WAR IN THE MIDDLE AGES* 69 (1965).

<sup>82</sup> Steven G. Calabrisi, *The Historical Origins of the Rule of Law*, 28 HARV. J. L. & PUB. POL. 273, 275 (2004).

God. The belief that God was the source of real law strengthened the idea of the “rule of law.”<sup>83</sup>

#### D. The Saxon Mirror

While canon law was of applicable everywhere in the Catholic world, national legal codes also began to develop.

The *Saxon Mirror* (*Sachsenspiegel*), published around 1235, was the first legal treatise written in the vernacular German. Hundreds of editions were produced, and it served as a model for authoritative legal treatises in other central European nations. The *Saxon Mirror* remained valid law in some parts of Germany until the late eighteenth century.<sup>84</sup> The treatise did not recognize a distinction between morality and law, or between law and society. The Prologue announced “God is Law itself, therefore justice is dear to him.”<sup>85</sup>

Killing in self-defense was lawful, although in some cases the burden of proof would be on the person claiming that he acted in self-defense.<sup>86</sup> Killing or wounding lawbreakers during the commission of a crime or flight therefrom was specifically authorized; the person who killed or wounded the lawbreaker was required to find six men who would back up the individual’s oath about the facts of the case.<sup>87</sup>

Use of force to recover goods from a red-handed thief was allowed, and the victim could raise the hue and cry to summon community assistance. However, if two people had a genuine dispute about the right to possess certain goods, the proper solution was bringing the case to court.<sup>88</sup> Raising the hue and cry was also authorized for rape or robbery.<sup>89</sup>

In some cases, a court would order both parties to a conflict not to carry weapons. Despite the order, the parties would still be allowed to carry swords, and to carry other weapons while serving the realm, or when participating in tournaments. Carrying of swords in castles, towns, or villages was allowed for residents, but prohibited for non-residents.

“Of course, one may carry weapons when responding to the hue and cry.” All able-bodied adult men, except for priests and a few others were obliged to respond to the hue and cry. They were required to follow the escaping criminal as long as they could track him—even if the criminal fled to another district, or hid inside a castle.<sup>90</sup>

Bailiffs were appointed by judges, to help enforce the law, and bailiffs could raise the hue and cry to obtain assistance.<sup>91</sup>

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<sup>83</sup> BERMAN, at 293.

<sup>84</sup> THE SAXON MIRROR: A SACHSENSPIEGEL OF THE FOURTEENTH CENTURY vii, 1 (transl., Maria Dobozy) (1999).

<sup>85</sup> Maria Dobozy, introduction to THE SAXON MIRROR, at 8 (*Got is selber recht, dar umme is im recht lip.*); THE SAXON MIRROR, “First Prologue,” at 67.

<sup>86</sup> SAXON MIRROR, book 2, § 15, at 97.

<sup>87</sup> *Id.*, book 2, § 69, at 113.

<sup>88</sup> *Id.*, book 2, § 34, at 103-04.

<sup>89</sup> *Id.*, book 2, § 64, at 112.

<sup>90</sup> *Id.*, book 2, § 72, at 113-14.

<sup>91</sup> *Id.*, book 3, § 56, at 130.

The *Saxon Mirror* announced: “a man must resist his king and judge if he does wrong, and must hinder him in every wrong, even if he be his relative or feudal lord. And he does not thereby break his fealty.”<sup>92</sup>

### **E. Liber Augustalis**

A more restrictive legal code was the *Liber Augustalis* proclaimed in 1231 by Emperor Frederick II of Sicily. The *Liber* too was meant to be a model for other states, and claimed to be based on divine reason.<sup>93</sup> The code recognized a man’s right to kill an attacker or thief “when he is in fear of his own life, or he who kills a nocturnal intruder while raising a clamor.”<sup>94</sup> “We desire that whoever hears a woman who is being attacked calling out should hasten to run to her assistance when he hears her.” A person failing to render aid would be fined.<sup>95</sup>

The carrying of weapons by people below the noble class was restricted because “the bearing of forbidden weapons is sometimes the cause of violence and murder.” An exception allowed townsmen to carry swords when traveling on business away from their hometowns.<sup>96</sup> One effect of disarming the masses while allowing the nobles to carry arms meant that nobles could abuse the lower classes with impunity.

### **F. The Establishments of Saint Louis**

*The Etablissements de Saint Louis* collected various customary laws around France. Defensive killing was allowed, provided that the killer had a wound proving which he had been attacked.<sup>97</sup> A commoner who struck his lord would suffer no penalty, if the lord had struck the commoner first.<sup>98</sup>

A liegeman was required to assist his baron in fighting the king, if the king refused to grant the baron a hearing on a dispute. On the other hand, if the king would hear the baron, the liegeman had no obligation to help the baron fight the king.<sup>99</sup>

### **G. Magna Charta and the Golden Bull**

In England in 1215, the barons forced King John to sign the *Magna Charta*.<sup>100</sup> Coerced to sign at the point of a sword, the King agreed that everyone was entitled to

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<sup>92</sup> Quoted in BERMAN, at 293.

<sup>93</sup> HEER, at 324.

<sup>94</sup> THE LIBER AUGUSTALIS OR CONSTITUTIONS OF MELFI PROMULGATED BY THE EMPEROR FREDERICK II FOR THE KINGDOM OF SICILY IN 1231, book 1, title 14, at 17-18 (transl., James M. Powell)(1971).

<sup>95</sup> LIBER AUGUSTALIS, book 1, title 23, at 26.

<sup>96</sup> *Id.*, book 1, title 10, at 15.

<sup>97</sup> THE ETABLISSEMENTS DE SAINT LOUIS: THIRTEENTH-CENTURY LAW TEXTS FROM TOURS, ORLÉANS, AND PARIS, book 1, “The Customs of Touraine and Anjou,” § 30, at 24-25 (transl., F.R.P. Akehurst)(1996). Akehurst explains that the *Etablissements* were never formally adopted anywhere as a legal code—unlike, for example, the *Saxon Mirror*. Rather, we should regard the *Etablissements* as a diverse collections of writings about what the law may have been in some parts of France some of the time, and of what some people believed the law should be.

<sup>98</sup> *Id.*, book 1, “The Customs of Touraine and Anjou,” § 53, at 36.

<sup>99</sup> *Id.*, book 1, “The Customs of Touraine and Anjou,” § 53, at 36.

<sup>100</sup> BERMAN, at 293.

“due process” of law, that no man would be imprisoned or exiled or fined “except by the lawful judgment of his peers or the law of the land”; that courts must operate according to regular procedures and at regular times and places; that the church should have its freedom; that criminal prosecutions must not be based on flimsy evidence; that new taxes would not be imposed without the consent of the taxpayers (the great land-holders); and that law enforcement officers such as sheriffs must know and obey the law.

Section 61 of the *Magna Charta* authorized a limited right of revolution. If the king disobeyed the *Magna Charta*, and refused a request from a committee of barons to address their grievances, then all barons had the right to summon forth the entire armed nation. Led by the barons, all free persons, bearing their personal weapons, would seize and hold the king’s castles, without harming the king or his family.<sup>101</sup>

Similarly, in Hungary in 1222, the nobles forced King Andrew II to promulgate a “Golden Bull,” in which legal process was regularized and the government made subject to law; taxation without consent was prohibited; a legislature (the Diet) was created; and abusive officials were required to forfeit their office.

Just as the *Magna Charta* recognized the right to the people to use force to enforce the great charter against future kings, so did the Golden Bull: “We also ordain that if We or any of Our Successors shall at any time contravene the terms of this statute, the bishops and the higher and lower nobles of Our realm, one and all, both present and future, shall by virtue thereof have the uncontrolled right in perpetuity of resistance both by word and deed without thereby incurring any charge of treason.”<sup>102</sup>

Neither the *Magna Charta* nor the Golden Bull were enthusiastically obeyed by succeeding monarchs. England went through many centuries of strife in attempting to compel kings of follow the *Magna Charta*. Hungarian governments were likewise uneven in their fealty to the Golden Bull. For example, after a failed peasant revolt in 1541, the government revised the Golden Bull to turn the peasants into serfs, and forbade them to bear arms. In 1688, the Austrian House of Habsburg consolidated its hold on Hungary by eliminating the right of Hungarian nobles to lead armed resistance to a monarch who grossly violated abused his powers.<sup>103</sup> (The English right of resistance under section 61 of the *Magna Charta* remains in force, theoretically, today.)

## VI. Scholasticism

### A. Cicero

The Little Renaissance saw the rediscovery of many of the great thinkers of Antiquity, especially Aristotle. One of the few writers who had never disappeared from Western consciousness was the Roman orator Cicero (106-43 B.C.). Although he had been a pagan, he was widely read, admired, and quoted.

Latin was the universal second language of the educated class, and so scholars writing in England could easily read the works of their colleagues from Italy, France, or

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<sup>101</sup> David I. Caplan & Sue Wimmershoff-Caplan, *Magna Charta*, in 2 GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF POLITICS, CULTURE, AND THE LAW 371-72 (ed., Gregg Lee Carter)(2002).

<sup>102</sup> BERMAN, at 294. Authorized resistance was called *jus resistendi*.

<sup>103</sup> PAUL KLÉBER MONOD, THE POWER OF KINGS: MONARCHY AND RELIGION IN EUROPE, 1589-1715, at 241 (1999).

Spain. In the study of Latin, the young student would inevitably spend hundreds of hours reading Cicero.

Cicero was an early exponent of Just War principles: War's only legitimate purpose was to secure peace. Defeated foes who had not been barbarous or blood-thirsty should be treated well, as when Rome gave citizenship to defeated Italian tribes. People who surrendered, such as inhabitants of a besieged city, should be protected and not abused.<sup>104</sup>

Cicero used natural law to argue for the right of self-defense, in a speech prepared for the trial of Titus Annius Milo:

What is the meaning of our retinues, what of our swords? Surely it would never be permitted to us to have them if we might never use them. This, therefore, is a law, O judges, not written, but born with us—which we have not learned, or received by tradition, or read, but which we have taken and sucked in and imbibed from nature herself; a law which we were not taught, but to which we were made—which we were not trained in, but which is ingrained in us—namely, that if our life be in danger from plots, or from open violence, or from the weapons of robbers or enemies, every means of securing our safety is honorable. For laws are silent when arms are raised, and do not expect themselves to be wait for, when he who waits will have to suffer an undeserved penalty before he can exact a merited punishment.

The law very wisely, and in a manner silently, gives a man a right to defend himself...the man who had used a weapon with the object of defending himself would be decided not to have had his weapon about him with the object of killing a man.<sup>105</sup>

Thus, natural law and common sense made it “morally right” to use deadly force to defend against a deadly attack.

Cicero noted that nothing in Republican Roman history was considered so glorious as tyrannicide.<sup>106</sup> Similarly, “What reason for war can be more just than driving

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<sup>104</sup> MARCUS TULLIUS CICERO, ON DUTIES (*De Officiis*) book 1, sects. 34-40, at 14-18 (eds., M.T. Griffine & E.M. Atkins)(1991).

<sup>105</sup> Marcus Tullius Cicero, *Speech in Defence of Titus Annius Milo*, in ORATIONS OF MARCUS TULLIUS CICERO 158-59 (transl., Charles Duke Yonger)(N.Y.: Colonial Pr., rev. ed. 1899). Cicero never delivered the speech as written, because Milo's enemy Pompey surrounded the courtroom with troops. However, the speech was preserved and studied by many generations of Latin students and scholars.

<sup>106</sup>

what greater crime can there be than to kill not merely another man, but even a close friend? Surely then, anyone who kills, although he is a close friend has committed himself to crime? But it does not seem so to the Roman people, which deems that deed the fairest of all splendid deed

CICERO, ON DUTIES, book 3, § 19, at 107. Also:

“And if a father should try to impose a tyranny, or to betray his country, will the son silent?” He will beseech his father not to do it, and if has no success, he will rebuke him and threaten him. In the last resort, if the affair would lead to the ruin of his homeland, he will put its safety before that of his father

off a despotism? For under this, even though the master happen not to be irksome, yet 'tis a wretched that he can [be irksome] if he will."<sup>107</sup>

Cicero had lived near the end of the Roman Republic. During most of the first millennium after Christ, the Christian Church had aligned with the authoritarian values of the Roman Empire. In the second millennium, Christians were beginning to rediscover the virtues of the Roman Republic. Not surprisingly, Cicero was John of Salisbury's favorite classical writer.<sup>108</sup>

## B. The Beginning of Scholasticism

The great intellectual movement which grew from the Little Renaissance was Scholasticism. Scholasticism treated certain texts (including the Bible, Justinian's *Corpus Juris*, and Aristotle's writings) as absolutely authoritative and correct. Yet Scholasticism recognized that there could be gaps and contradictions within a given authoritative text, and between different authorities. Scholasticism sought methodically to reconcile the seeming gaps and contradictions.<sup>109</sup> In Scholasticism, Roman law was combined with Greek philosophy, and both were then combined with values of the Judeo-Christian conscience, such as mercy and love.<sup>110</sup> In the difficulty of the synthesis that was attempted and achieved, Scholasticism was one of the greatest human intellectual accomplishments. Intellectual life had emerged from the Dark Ages.

Around 534 A.D., the Byzantine Emperor Justinian had ordered the creation of a compilation of all known Roman Law. This compilation had four parts: The Code (*Codex Justinianus*) was a collection of laws and decisions made by Roman Emperors before Justinian.<sup>111</sup> The Novels (*Novellae constitutiones*) were the laws created by Justinian. The Institutes was an introductory textbook summarizing the law. The most important part were 50 the books of the Digest (*Digesta*), which compiled excerpts from cases decided by Roman judges, and opinions written by legal scholars. Some of the material in the Digest was so old that it came from the time before Julius Caesar destroyed the Roman Republic and turned it into a dictatorship.<sup>112</sup>

Justinian's treatises provided the foundation of Byzantine law from thenceforward. The treatises also provided a compilation of law as it had existed in both the eastern and western Roman empires, before the western empire fell.

Like most of the rest of Roman learning, Justinian's treatises were forgotten in the West during the Dark Ages. When a copy was rediscovered around 1080, it set off a legal revolution in the West. Western legal scholarship primarily focused on understanding and

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*Id.*, book 3, § 90, at 135. The Roman philosopher Seneca (4 B.C-65 A.D.) wrote, "No offering is more acceptable to God than the blood of a tyrant." *SENECA, DE BENEFICIIS* 8, 20 (transl., A. Golding)(1974).

<sup>107</sup> Marcus Tullius Cicero, *Eighth Philippic*, quoted in John Milton, *The Tenure of Kings and Magistrates*, in *AREOPAGATICA AND OTHER POLITICAL WRITINGS OF JOHN MILTON* 136 (Indianapolis: Liberty Fund, 1999)(reprinting selected texts from the 1931 edition of *The Works of John Milton*, by Columbia Univ. Pr.).

<sup>108</sup> FRANKLIN L. FORD, *POLITICAL MURDER: FROM TYRANNICIDE TO TERRORISM* 123 (1985).

<sup>109</sup> BERMAN, at 131.

<sup>110</sup> *Id.*, at 146.

<sup>111</sup> For detailed analysis of Code provisions on self-defense and arms, see Will Tysse, *The Roman Legal Treatment of Self Defense and the Private Possession of Weapons in the Codex Justinianus*, 16 J. FIREARMS & PUB. POL. 163 (2004).

<sup>112</sup> BERMAN, at 127.

interpreting the Digest. It was not considered to be a set of laws of historical interest (what the law used to be five centuries before in Byzantium), but rather an authoritative statement of the true law that was at all times applicable everywhere.<sup>113</sup> Westerners called the collection of all four items in Justinian's compilation the *Corpus Juris Civilis*, the body of civil law.<sup>114</sup> The *Corpus Juris*, which was enormously influential on canon law, became the foundation of the legal systems in most of continental Western Europe.

Because the authors of the *Corpus Juris* had written down all the legal rules and decisions they could find, and had merely organized the rules and decisions by subject-matter, there appeared to be many legal standards which were contradicted by other legal standards. Using techniques that have become part of the intellectual tools of every good lawyer, legal scholars at the University of Bologna and elsewhere looked for ways to reconcile the seemingly inconsistent statements in Justinian's text. "Glossolators" provided a gloss—that is, explanatory commentary in the wide margins of the printed edition of Justinian's *Corpus Juris*—which sought to explicate and reconcile the various rules.

Gratian was first to bring the Scholastic approach to canon law. The title of his treatise showed his objective of harmonizing "Discordant Canons."

At the University of Paris, the great Peter Abelard was the first to apply Scholasticism to theology.

John of Salisbury, who had studied under Abelard, was the first to utilize the Scholastic method to politics, with his book *Policraticus*.<sup>115</sup>

For a simple example of Scholastic methodology, let us consider the issue of self-defense. The Bible has some passages which order killing or use of force, and other passages which seem to prefer non-violence. Roman law had the rule "Force may be used to repel force" (*Vim vi repellere licit*). The Scholastics synthesized the various sources, and produced comprehensive rules about when force was legitimate (such as to enforce the law, self-defense, defense of another, to protect the property of oneself or another). The Scholastics also formulated condition limiting the use of force (such as not using more force than was reasonably necessary). On the foundation of the rules about personal defense, the Scholastics developed a theory of Just War, specifying the conditions under which a war could be just, and the restrictions on use of force even during a war.<sup>116</sup>

### C. Aristotle

Aristotle had been almost completely forgotten in the West during the Dark Ages, but his works were gradually being rediscovered. Christians encountered the works of the Spanish Muslim philosopher Averrhöes (1126-1198), who penned *Commentaries on Aristotle*. Also influential was Avicenna (980-1037), a Persian who wrote an influential medical treatise, and a philosophical encyclopedia which discussed Aristotle.<sup>117</sup> (Both

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<sup>113</sup> *Id.*, at 123.

<sup>114</sup> *Id.*, at 128. "Civil" (Roman) law was distinct from church law (canon law) and from law which only applied in certain areas (such as the "common law" which applied throughout England, but not elsewhere). The name "Corpus Juris Civilis" began to be used in the sixteenth century.

<sup>115</sup> *Id.*, at 280.

<sup>116</sup> *Id.*, at 148.

<sup>117</sup> Scholars devoted to the study of Averrhöes (a/k/a Avveroes, a/k/a Ahmad ibn Rushd) congregated at the University of Padua. In the Islamic world, he was mostly forgotten after his death in 1198. IBN WARRAQ,

Averrhöes and Avicenna were persecuted by Muslim authorities as heretics.) Some Christians also read the Jewish philosopher Maimonides, who knew Aristotle's work. The first Latin translation of Aristotle's *Politics* came in 1260, and caused an intellectual crisis.<sup>118</sup>

Augustine of Hippo had written in the late fourth and early fifth century, a period when the Western Roman Empire was entering its final period of decline, leading to its dissolution several decades later. Augustine had regarded civic and political life as incapable of improvement. While he pondered how to live righteously on the earth, he kept his vision fixed on the world to come. No Christian writer even came close to the immense influence and prestige of Augustine.<sup>119</sup>

In contrast, Aristotle was animated by a spirit of scientific inquiry and curiosity, by belief that political life could be developed in accordance with liberty, and by concern for life in the present, rather than the afterlife.

The rediscovery of Aristotle was sharply condemned by reactionary forces in the Church, including the Franciscans, who opposed the study of pagan thinkers. Nor did the reactionaries approve of Aquinas and other scholastics studying scholars who has written about Aristotle, such as the Muslims Averrhöes and Avicenna or the Jew Maimonides.<sup>120</sup>

But starting at the University of Paris, and led by Dominican teachers, progressive scholars began searching for ways to reconcile Aristotle with Christian teaching.<sup>121</sup> The reconciliation might be considered the purest and most classic form of Scholasticism. Aristotle would soon eclipse even Cicero as an influence on the Western Christian mind.

In *Politics*, Aristotle maintained that each citizen should work to earn his own living, should participate in political or legislative affairs, and should bear arms.

Aristotle criticized the theory of the philosopher Hippodamus, who wanted a strict division of roles between skilled labor, agriculture, and defense. Aristotle found Hippodamus' division defective, because such as division would lead to the unarmed being ruled by the armed: "the farmers share [in the voting franchise] without possessing arms, and the artisans share without possessing either land or arms, which makes them both, in effect, the slaves of the class in possession of arms."<sup>122</sup>

Aristotle considered the possession of arms synonymous with possession of political power: "when the masses govern the state with a view to the common interest...the defence forces are most sovereign body under this constitution, and those who possess arms are the persons who enjoy constitutional rights."<sup>123</sup>

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WHY I AM NOT A MUSLIM 270-72 (1995). Avicenna (a/k/a Ibn Sina) lived from 980 to 1037. He thought that much of the *Koran* should be understood allegorically, rather than literally. *Id.*, at 264.

<sup>118</sup> *Id.*, at 275.

<sup>119</sup> Except, obviously, the authors of the New Testament.

<sup>120</sup> HEER, at 266-67, 309; RAMBAM: READINGS IN THE PHILOSOPHY OF MOSES MAIMONIDES 35 (transl. & commentary, Lenn Evan Goodman)(1976).

<sup>121</sup> SKINNER, RENAISSANCE, at 50-51.

<sup>122</sup> THE POLITICS OF ARISTOTLE, book 2, ch 8, § 8, at 69-70 (transl., Ernest Barker)(1946).

<sup>123</sup> *Id.*, book 3, ch. 7, § 4, at 114.

In *The Athenian Constitution*, written about 350 B.C., Aristotle gave a political history of the city-state of Athens. Rediscovered in the late nineteenth century, *The Athenian Constitution* provided historical evidence for Aristotle's theory that tyrants aim to disarm the people.

In the sixth century B.C., the tyrant Pisistratus took over Athens. Aristotle explained how the tyrant obtained absolute power by disarming the people of every city he controlled:

Aristotle linked the development of democracy (rule by the people) with military innovations making foot soldiers relevant: when “states began to increase in size, and infantry forces acquired a greater degree of strength, more persons were admitted to the enjoyment of political rights.”<sup>124</sup>

In the essential elements of the existence of a state, “The third is arms: the members of a state must bear arms in person, partly in order to maintain authority and repress disobedience, and partly in order to meet any threat of external aggression.”<sup>125</sup> It was hardly surprising that dictators always disarmed their subjects: “It is from oligarchy that tyranny derives its habits of distrusting the masses, and policy, consequent upon it, of depriving them of arms.”<sup>126</sup>

“The devices adopted...for fobbing the masses off with sham rights” included that “The poor are allowed not have any arms, and the rich are fined for not having them.”<sup>127</sup>

Theorizing the people who bear the burdens of government should be the ones who run the government, Aristotle wrote that “The government should be confined to those who carry arms.” The early American Republic generally reflected this scheme; the group of people liable for militia duty was roughly the same as the group of people eligible to vote.

In a good government, the king would have enough armed men so that he could defend the laws, but this collection of armed men should not be stronger than the people.<sup>128</sup>

Peter of Auvergne, who was a follower of Aquinas, the Rector of the University of Paris, Bishop of Clermont, and the author of an influential commentary on Aristotle, interpreted Aristotle to mean that it would be sinful for the people not to rebel, if their cause were just and they had the strength to succeed.<sup>129</sup>

Aristotle was the fountainhead of Scholasticism, but he remained immensely influential for many centuries afterward, and for non-Catholic thinkers. “His was the vocabulary with which seventeenth-century men studied the forms of government and

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He deprived the people of their arms in the following manner. He held an armed parade in the Theseum (a temple), tried to address the assembled people, and spoke for a short time. When they said they could not hear him, he told them to go up to the entrance gate of the Acropolis, so that he could make himself better heard. While he took up time with his harangue, men who had been instructed to do this took the arms, shut them up in the buildings near the Theseum, and came and signaled to Pisistratus. When he finished the rest of his speech, he told the people what had been done with their arms, saying that they should not be startled or disheartened but should go and attend to their private affairs, and that he would take care of all public affairs.

ARISTOTLE, *THE ATHENIAN CONSTITUTION* ch. 15, at 57 (transl. P.J. Rhodes)(2002).

After Athens was defeated by Sparta in the Peloponnesian War, Sparta appointed the Thirty Tyrants to rule Athens in 404 B.C. Consolidating power, the Tyrants disarmed the entire Athenian population, except for three thousand supporters of the tyrants. *Id.*, ch. 37, at 81-82.

<sup>124</sup> THE POLITICS OF ARISTOTLE, book 4, ch. 13, § 10, at 188.

<sup>125</sup> *Id.*, book 7, ch. 8, § 7, at 299.

<sup>126</sup> *Id.*, book 5, ch 10, § 11, at 237.

<sup>127</sup> *Id.*, book 4, ch. 13, sects. 1, 4, at 186-87.

<sup>128</sup> *Id.*, book 3, chs. 11 & 15.

<sup>129</sup> Jean Dunbabin, *Government*, in *CAMBRIDGE MEDIEVAL*, at 494, citing Peter of Auvergne, *Continuation of Aquinas*.

conceived of politics as the pursuit of the good life.”<sup>130</sup> In 1825, Thomas Jefferson explained that the ideas in the *Declaration of Independence* derived from “the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, &c.”<sup>131</sup>

#### **D. Aquinas and the *Summa Theologica***

The child of thirteenth-century Italian aristocrats, Thomas Aquinas was nicknamed “the Dumb Sicilian Ox,” because he was stout, and slow in manner. As his teachers discovered, however, he was also brilliant. Against the wishes of his family, he joined the Dominican order, an Order which preached the Crusades.<sup>132</sup>

His family kidnapped him, and held him prisoner for two years, before finally releasing him to lead the life he chose.

The early Scholastic works of Peter Abelard and others had been highly controversial. In the early thirteenth century, many Christians believed that faith and reason existed in completely separate realms; the other faction argued that reason must be subordinated to faith. Aquinas accepted neither theory, and instead showed how faith and reason, while separate, are complementary gifts from God. He developed proofs to demonstrate the existence of God, proofs which depended solely on logic, rather than faith. Other spiritual truths, while not provable by reason, could be better understood by the application of reason, Aquinas showed.

Augustine, who was influenced by Plato, had viewed worldly affairs as squalid and depressing. According to Augustine, a person could not be allied with the heavenly world and the earthly world at the same time. In contrast, the optimistic Aquinas agreed with Aristotle that humans are capable of building a more rational and better society. Improving life on earth was not inconsistent with devotion to the heavenly kingdom.<sup>133</sup>

Describing God as the “most perfect of intellectual beings,” Aquinas made it intellectually respectable for theologians to study rationally the nature of God, rather than to rely solely on faith. For making reason theological respectable, Aquinas has been called the “father of the enlightenment,” the author of “the great Magna Carta of an open-minded European rationalism.”<sup>134</sup>

Aquinas was declared a saint in 1323, and later declared to be patron saint of all universities, colleges, and schools. Known as the *doctor angelicus*, Aquinas has been ranked with St. Paul and St. Augustine as one of the very greatest of all Christian writers. In 1545, when the Roman Catholic Church was reeling from the Protestant Reformation, the Council of Trent was assembled. At the Council, Pope Paul III placed Aquinas’s *Summa Theologica* on the altar, along with the Bible. Until the early twentieth century, Catholic theological education was based on Scholasticism.

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<sup>130</sup> Blair Worden, *English Republicanism*, in THE CAMBRIDGE HISTORY OF POLITICAL THOUGHT 1450-1700, at 445 (ed., J.H. Burns)(1996), at 445. Hereinafter cited as CAMBRIDGE 1450-1700.

<sup>131</sup> Thomas Jefferson, letter to Henry Lee, May 8, 1825.

<sup>132</sup> MICHAEL WALSH, WARRIORS OF THE LORD: THE MILITARY ORDERS OF CHRISTENDOM 115 (2003).

<sup>133</sup> R.W. Dyson, *Introduction to Thomas Aquinas*, POLITICAL WRITINGS xxiii-xxv (transl., R.W. Dyson)(2002).

<sup>134</sup> HEER, at 268-69.

## 1. Aquinas on Just War

The *Summa Theologica* proceeded according to the classic Scholastic method of question and answer, objection and refutation. Aquinas asked “Whether it is always sinful to wage war?”<sup>135</sup>

Aquinas pointed to Augustine’s letter on the soldier who was baptized by John the Baptist: “If the Christian Religion forbade war altogether, those who sought salutary advice in the Gospel would rather have been counseled to cast aside their arms, and to give up soldiering altogether. On the contrary, they were told: ‘Do violence to no man . . . and be content with your pay’. If he commanded them to be content with their pay, he did not forbid soldiering.”<sup>136</sup>

Aquinas then elaborated the first of three essential conditions of just war:

*I answer that*, In order for a war to be just, three things are necessary. First, the authority of the sovereign by whose command the war is to be waged. For it is not the business of a private individual to declare war, because he can seek for redress of his rights from the tribunal of his superior....And as the care of the common weal is committed to those who are in authority, it is their business to watch over the common weal of the city, kingdom or province subject to them. And just as it is lawful for them to have recourse to the sword in defending that common weal against internal disturbances, when they punish evil-doers, according to the words of the Apostle (Rm. 13:4): “He beareth not the sword in vain: for he is God’s minister, an avenger to execute wrath upon him that doth evil”; so too, it is their business to have recourse to the sword of war in defending the common weal against external enemies. Hence it is said to those who are in authority (Ps. 81:4): “Rescue the poor: and deliver the needy out of the hand of the sinner”; and for this reason Augustine says (Contra Faust. xxii, 75): “The natural order conducive to peace among mortals demands that the power to declare and counsel war should be in the hands of those who hold the supreme authority.”

Aquinas’ principle that war should “Rescue the poor: and deliver the needy out of the hand of the sinner” can justify humanitarian intervention in states which are ruled by tyrants who destroy all human rights and who engage in mass murder. It can also justify civil war against a domestic tyrant.

The second requirement of Just War was that there be a just cause:

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<sup>135</sup> THOMAS AQUINAS, *SUMMA THEOLOGICA*, Second Part of the Second Part, Question 40, article 1, (transl., Fathers of the English Dominican Province) (Benziger Bros. edition, 1947), [www.ccel.org/a/aquinas/summa](http://www.ccel.org/a/aquinas/summa).

In the block quotes from *Summa* the (parenthetical insertions) were made by Aquinas himself. The [bracketed insertions] are insertions by the modern translators, to correct citation errors in Aquinas’ original, or to provide proper cross-references. In the endnotes for *Summa*, the endnotes with [bracketed text] are written by the modern translators, not by me.

In the rest of Question 40, Aquinas argued that it is not legitimate for clerics and bishops to fight personally; that ambushes and deception were permissible in war; and “for the purpose of safeguarding the common weal of the faithful, it is lawful to carry on a war on holy days, provided there be need for doing so.”

<sup>136</sup> The Augustine quote appears in Augustine’s letter to Marcel. letter no. 87.

Secondly, a just cause is required, namely that those who are attacked, should be attacked because they deserve it on account of some fault. Wherefore Augustine says...: “A just war is wont to be described as one that avenges wrongs, when a nation or state has to be punished, for refusing to make amends for the wrongs inflicted by its subjects, or to restore what it has seized unjustly.”<sup>137</sup>

Finally, the war should be fought with good intention—for the purpose of protecting the good, rather than for cruel or selfish motives:

Thirdly, it is necessary that the belligerents should have a rightful intention, so that they intend the advancement of good, or the avoidance of evil.... For it may happen that the war is declared by the legitimate authority, and for a just cause, and yet be rendered unlawful through a wicked intention. Hence Augustine says (*Contra Faust.* xxii, 74): “The passion for inflicting harm, the cruel thirst for vengeance, an unpacific and relentless spirit, the fever of revolt, the lust of power, and such like things, all these are rightly condemned in war.

Aquinas addressed the objections to Just War, and replied to the objections.

The first objection was that Jesus had said “All that take the sword shall perish with the sword.” (Mathew 26:52). Aquinas replied that to use the sword when in service of public authority, as in war “is not to ‘take the sword,’ but to use it as commissioned by another...”

A second objection was that Jesus had said “But I say to you not to resist evil” (Mt. 5:39), and Paul had said “Not revenging yourselves, my dearly beloved, but give place unto wrath.” (Romans 12:19). Aquinas replied, “Nevertheless it is necessary sometimes for a man to act otherwise for the common good, or for the good of those with whom he is fighting.”

The third objection to Just War was that “nothing, except sin, is contrary to an act of virtue. But war is contrary to peace. Therefore war is always a sin.” Aquinas replied:

Those who wage war justly aim at peace, and so they are not opposed to peace, except to the evil peace, which Our Lord “came not to send upon earth” (Mt. 10:34). Hence Augustine says (*Ep. ad Bonif.* clxxxix): “We do not seek peace in order to be at war, but we go to war that we may have peace. Be peaceful, therefore, in warring, so that you may vanquish those whom you war against, and bring them to the prosperity of peace.”<sup>138</sup>

The fourth objection to Just War being lawful was that “warlike exercises which take place in tournaments are forbidden by the Church.” Aquinas replied:

Manly exercises in warlike feats of arms are not all forbidden, but those which are inordinate and perilous, and end in slaying or plundering. In olden times

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<sup>137</sup> The Augustine quote is from Augustine, *Questions on the Heptateuch (Locutiones in Heptateuchum)* (420 A.D.), question 10.

<sup>138</sup> The Augustine citation is for Augustine’s second letter to Boniface. Augustine, letter no 189, “From Augustine to Boniface” (418 A.D.), [www.newadvent.org/fathers/1102189.htm](http://www.newadvent.org/fathers/1102189.htm).

warlike exercises presented no such danger, and hence they were called “exercises of arms” or “bloodless wars”...

So relying heavily on Augustine, Aquinas filled out the Just War theory which to this day guides the Roman Catholic Church: Just Wars must be declared by lawful authorities; the proper decision-makers about Just War are not ecclesiastical authorities, but rather the civil authorities who are entrusted with the protection of the community. Just War requires attention to *jus ad bellum* (whether the war is fought for proper objectives, such as national defense) and to *jus in bello* (fighting in a proper, just way—such as not targeting civilians).

## 2. Aquinas on Self-Defense

In Question 64, “Of Murder,” Aquinas considered various questions about killing, including defensive killing.<sup>139</sup>

“Whether it is a sin to kill dumb animals or even plants?” No, because they are made to be eaten and killed by humans.

“Whether it is lawful to kill a sinner?” Yes, “in order to safeguard the common good.” Is killing a sinner “lawful to a private individual or to a public person only?” Only by “persons of rank having public authority,” not by private individuals.

“Whether this is lawful to a cleric?” No, because executing people is inconsistent with clerics’ special vocation. Here, Aquinas distinguished the special role of the clergy. He did not mean that killing is immoral, just because it is forbidden to clergy. By analogy, the Catholic clergy are not supposed to marry and raise children, but marriage and parenthood are still morally good.

The next question was “Whether it is lawful to kill oneself?” No, because it is unnatural, because it harms the community, and because the decision belongs only to God. However, in very rare cases, the Holy Ghost might authorize a victim of government persecution to take his life.

“Whether it is lawful to kill a just man?” No, because it harms the common good.

“Whether it is lawful to kill a man in self-defense?” As with the rest of the *Summa*, Aquinas first set forth the arguments for the incorrect position, and then refuted them. For ease of understanding, I instead present Aquinas’ own view first, followed by the objections and Aquinas’ replies.

Aquinas explained:

It is written (Ex. 22:2): “If a thief be found breaking into a house or undermining it, and be wounded so as to die; he that slew him shall not be guilty of blood.”

Now it is much more lawful to defend one’s life than one’s house. Therefore neither is a man guilty of murder if he kill another in defense of his own life.

Aquinas continued by offering his famous theory of “double effect.” Killing a person in self-defense is not murder, because the defender has no intention to kill; his intention is merely to protect himself, which is proper and reasonable. The defender intends the

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<sup>139</sup> AQUINAS, *SUMMA THEOLOGICA*, Second Part of the Second Part, Question 64.

legitimate effect of preserving his own life; the second effect, the death of the attacker, is not culpable, because the defender was not intending that result:

*I answer that,* Nothing hinders one act from having two effects, only one of which is intended, while the other is beside the intention. Now moral acts take their species according to what is intended, and not according to what is beside the intention, since this is accidental as explained above.... Accordingly the act of self-defense may have two effects, one is the saving of one's life, the other is the slaying of the aggressor. Therefore this act, since one's intention is to save one's own life, is not unlawful, seeing that it is natural to everything to keep itself in "being," as far as possible. And yet, though proceeding from a good intention, an act may be rendered unlawful, if it be out of proportion to the end. Wherefore if a man, in self-defense, uses more than necessary violence, it will be unlawful: whereas if he repel force with moderation his defense will be lawful, because according to the jurists, "it is lawful to repel force by force, provided one does not exceed the limits of a blameless defense." Nor is it necessary for salvation that a man omit the act of moderate self-defense in order to avoid killing the other man, since one is bound to take more care of one's own life than of another's. But as it is unlawful to take a man's life, except for the public authority acting for the common good, as stated above (Article 3), it is not lawful for a man to intend killing a man in self-defense, except for such as have public authority, who while intending to kill a man in self-defense, refer this to the public good, as in the case of a soldier fighting against the foe, and in the minister of the judge struggling with robbers, although even these sin if they be moved by private animosity.<sup>140</sup>

Notice, by the way, how Aquinas' theory of double effect resembles Cicero's speech in defense of Milo: "the man who had used a weapon with the object of defending himself would be decided not to have had his weapon about him with the object of killing a man."

The first and second objections to self-defense were that Augustine had criticized it in his letter to Publicola and his book *Free choice of the Will*. Aquinas replied:

The words quoted from Augustine refer to the case when one man intends to kill another to save himself from death. The passage quoted in the Second Objection is to be understood in the same sense.

The third objection was that Pope Nicholas I, in a case involving some clerics who killed a pagan in self-defense, had ruled "in no case is it lawful for them to kill any man under any circumstances whatever."<sup>141</sup> Aquinas replied that clerics who killed were

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<sup>140</sup> I filled out some of the abbreviations used by Aquinas in his cross-references to other parts of the *Summa*. The reference to the "jurists" is to Justinian's *Corpus Juris*.

<sup>141</sup> Pope St. Nicholas I the Great reigned from 858 to 867. He was certainly not opposed to warfare in general. In 866, he wrote a famous letter to Boris I, the Khan of Bulgaria (reigned 852-889), who was thinking of becoming a Christian, and who had many questions about Christianization would mean for Bulgaria. Boris asked if warfare were permissible during Lent (the half-season preceding Easter). Pope Nicholas replied:

Therefore, if no necessity compels you, you should abstain from battles not only during Lent, but at all times. But if some unavoidable event drives you, you should without

acting irregularly—contrary to their vocation. The same could not be said of laity who killed in self-defense.

The fourth objection was:

Further, murder is a more grievous sin than fornication or adultery. Now nobody may lawfully commit simple fornication or adultery or any other mortal sin in order to save his own life; since the spiritual life is to be preferred to the life of the body. Therefore no man may lawfully take another's life in self-defense in order to save his own life.

Aquinas' reply was unpersuasive: "The act of fornication or adultery is not necessarily directed to the preservation of one's own life, as is the act whence sometimes results the taking of a man's life."

Aquinas dodged the issue. Although fornication or adultery are usually not "directed to the preservation of one's own life", what about the rare instances when they are? The better response would be that adultery or fornication should be permitted, in the unusual situation in which they might be necessary to save a life; for example, a single mother might try to seduce a violent home invader, in order to keep him from killing her children.

The fifth objection was that St. Paul had written: "Not defending yourselves, my dearly beloved." (Romans 12:19). Aquinas replied, "The defense forbidden in this passage is that which comes from revengeful spite. Hence a gloss says: 'Not defending yourselves—that is, not striking your enemy back.'"<sup>142</sup>

### 3. Aquinas on Revolution

Another question posed by Aquinas showed how radically the world had changed since Pope Gregory VII unleashed the Papal Revolution. Aquinas asked, "Whether sedition is always a mortal sin?"<sup>143</sup>

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hesitation spare no preparation for war in defense of not only yourself but also your country and the laws of your fathers, lest man seem to tempt God, if he has the wherewithal and does not take care to take counsel for his own safety and the safety of others and does not take precautions against damage to the holy religion.

*The Responses of Pope Nicholas I to the Questions of the Bulgars A.D. 866* (Letter 99), transl., W. L. North, ch. 46, [www.fordham.edu/halsall/basis/866nicholas-bulgar.html](http://www.fordham.edu/halsall/basis/866nicholas-bulgar.html).

Boris also wrote to St. Photios the Great, the Orthodox Patriarch of Constantinople, who told Boris that a characteristic of a good ruler was bravery in combat, although kindness to subjects was an even greater virtue. Alexander F.C. Webster, *Justifiable War as a "Lesser Good" in Eastern Orthodox Moral Tradition*, 47 ST. VLADIMIR'S THEOLOGICAL Q. , 21 (2003), citing THE HOMILIES OF PHOTIOS, PATRIARCH OF CONSTANTINOPLE (transl., Cyril Mangos)(1955).

<sup>142</sup> Aquinas read Romans 12:19 the same as would the translator of the King James Bible, which of course was the Bible read by the overwhelming majority of Americans at the time of the Revolution. In the KJV, the passage reads, "Dearly beloved, avenge not ourselves, but rather give place unto wrath: for it is written, Vengeance in mine; I will repay saith the Lord." Vengeance for a past injury is very different from self-defense to prevent an imminent injury.

<sup>143</sup> AQUINAS, SUMMA THEOLOGICA, Second Part of the Second Part, Question 42, article 2. Aquinas also addressed the question of revolution in two previous works. In *On Kingship*, he wrote that intolerable tyrants could be overthrown, but only by public authorities, not by purely private individuals. THOMAS

Aquinas rebutted arguments that sedition was not a mortal sin. (A mortal sin is something contrary to divine law, and is much more serious than a venial sin.) Aquinas found that sedition was a mortal sin, because it destroyed social unity:

[S]edition is contrary to the unity of the multitude, viz. the people of a city or kingdom....[S]edition is opposed is the unity of law and common good: whence it follows manifestly that sedition is opposed to justice and the common good. Therefore by reason of its genus it is a mortal sin, and its gravity will be all the greater according as the common good which it assails surpasses the private good which is assailed by strife.

Accordingly the sin of sedition is first and chiefly in its authors, who sin most grievously; and secondly it is in those who are led by them to disturb the common good. Those, however, who defend the common good, and withstand the seditious party, are not themselves seditious, even as neither is a man to be called quarrelsome because he defends himself...

Thus, the heaviest blame for the “sin of sedition” fell on people who stirred up sedition. People who resisted sedition were not blameworthy; rather, they were defending the common good.

Bad governments had used Christian teaching against sedition in order to convince discontented subjects that it would unchristian for them to resist evil government. Aquinas, however, turned the notion of sedition on its head. He agreed that sedition against a just ruler was sinful. However, when a tyrant misruled a city, and the people overthrew him, it was not the people who were guilty of sedition; it was the tyrant who was guilty:

A tyrannical government is not just, because it is directed, not to the common good, but to the private good of the ruler, as the Philosopher [Aristotle] states (Polit. iii, 5; Ethic. viii, 10). Consequently there is no sedition in disturbing a government of this kind, unless indeed the tyrant’s rule be disturbed so inordinately, that his subjects suffer greater harm from the consequent disturbance than from the tyrant’s government. Indeed it is the tyrant rather that is guilty of sedition, since he encourages discord and sedition among his subjects, that he may lord over them more securely; for this is tyranny, being conducive to the private good of the ruler, and to the injury of the multitude.

Aquinas’ insight, which would have shocked a tenth-century scholar, was embodied in the Second Amendment to the United States Constitution. U.S. Supreme Court Justice Joseph Story, who served on the Supreme Court 1811 to 1845, was second only to Chief Justice Marshall in shaping the Court in its first century. Justice Story also wrote nine major legal treatises, and played a tremendous role in the development of Harvard Law School.

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AQUINAS, ON KINGSHIP, book 1, paras. 45-49, at 25-27 (transl., Gerald B. Phelan)(Toronto, Canada: Pontifical Institute of Mediaeval Studies, 1949). In *Scripta Super Libros Sententiarum*, he applauded the killing of Julius Caesar. Thomas Aquinas, *Scripta Super Libros Sententiarum*, in AQUINAS, POLITICS WRITINGS, II, dist. 44, question 2, at 75 (when the people have no recourse to a superior who can help them, “he who delivers his country by slaying a tyrant is to be praised and rewarded.”) Both of these works were composed before Aquinas wrote the portion of *Summa* dealing with revolution.

In Story's 1840 book, *Familiar Exposition of the Constitution of the United States*, Story explained that purpose of the Second Amendment was to make sure that the people had arms. In case the proper political order were disturbed by foreign invasion or domestic tyranny, the people could restore constitutional rule.<sup>144</sup>

In the early twentieth century, the same point was made by Theodore Schroeder, leader of the Free Speech League, the first group in American history to defend the rights of all speakers on all subjects, based on the principles of the First Amendment. Schroeder's 1916 book *Free Speech for Radicals* looked at the history of England's Glorious Revolution of 1688, which had been provoked, in part, by the Stuart monarchy's attempts to disarm the public:

...If we are to erect this complaint against disarming part of the people into a general principle, it must be that in order to maintain freedom we must keep alive both the spirit and the means of resistance to government whenever "government is in rebellion against the people," that being a phrase of the time. This of course included the right to advocate the timeliness and right of resistance.

The reformers of that period were more or less consciously aiming toward the destruction of government from over the people in favor of government from out of the people, or as Lincoln put it, "government of, for and by the people." Those who saw this clearest were working towards the democratization of the army by abolishing standing armies and replacing them by an armed populace defending themselves, not being defended and repressed by those in whose name the defence is made.

Upon these precedents, others like them, and upon general principles reformers like DeLolme and John Cartwright made it plain that the right to resist government was one protected by the English Constitution.<sup>145</sup>

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<sup>144</sup> JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264-65 (1842 reprint):

The next amendment is, "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia. The friends of a free government cannot be too watchful, to overcome the dangerous tendency of the public mind to sacrifice, for the sake of mere private convenience, this powerful check upon the designs of ambitious men.

The importance of this article will scarcely be doubted by any persons, who have duly reflected upon the subject. The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and it will generally, even if these are successful in the first instance, enable the people to resist and triumph over them....

<sup>145</sup> THEODORE SCHROEDER, FREE SPEECH FOR RADICALS 105-06 (Riverside, Conn.: Hillacre Bookhouse, published for the Free Speech League, 1916).

When writing that tyrannical “government is in rebellion against the people,” Schroeder, who was not Catholic, had probably never read Aquinas’s statement that “it is the tyrant rather than the guilty of sedition.” Still, the point is the same: Revolution against tyranny was not rebellion against government; it was the restoration of legitimate government.

## VII. From the Second Scholastics to the Second Amendment

Like Aquinas, the American Founders were insatiable readers of Aristotle and Cicero. It is also true that the principles of the American Revolution and the Second Amendment often echo similar principles expressed centuries before by Manegold of Lautenbach, John of Salisbury, Thomas Aquinas, and other Catholic writers. However, the transmission of the medieval Catholic ideas to the mostly-Protestant American Revolutionaries was indirect.

### A. The Geneva Protestants

The first major writers to transmit Catholic revolutionary theory to the Protestant mind were the French and English Protestants who fled to Geneva in the sixteenth century, to escape persecution in their home countries. These Geneva writers include Theodore Beza, Peter Martyr Vermigli, Christopher Goodman, John Poynt, and especially the pseudonymous Marcus Junius Brutus.<sup>146</sup> The latter penned *Vindiciae Contra Tyrannos* (Vindication Against Tyrants) in 1579.<sup>147</sup> *Vindiciae* was organized like a Catholic Scholastic treatise. Like the other Geneva writers, Brutus owed a great debt to Catholic thought on the subject of Just Revolution.<sup>148</sup>

John Adams called *Vindiciae* one of the leading books by which England’s and America’s “present liberties have been established.”<sup>149</sup> In the book *Defence of the Constitutions of Government of the United States of America*, Adams pointed to three periods of English history when intellectuals confronted tyranny and analyzed the issue of how governments should be constituted. According to Adams, the English reformation was the first period, when John Poynt set forth “all the essential principles of liberty, which were afterward dilated on by Sidney and Locke.”<sup>150</sup> (As noted *infra*, Thomas Jefferson described Algernon Sidney and John Locke, along with Aristotle and Cicero, as the major sources of the already well-established principles of public right which Jefferson set forth in the Declaration of Independence.)

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<sup>146</sup> Named for the Roman Senator who assassinated Julius Caesar, and the nephew of the great republican Roman Senator Cato.

<sup>147</sup> MARCUS JUNIUS BRUTUS, *VINDICIAE, CONTRA TYRANNOS: OR, CONCERNING THE LEGITIMATE POWER OF A PRINCE OVER THE PEOPLE, AND OF THE PEOPLE OVER A PRINCE* (ed., George Garnett)(1994)(1<sup>st</sup> pub. 1579); KELLY, at 44.

<sup>148</sup> KELLY, at 44.

<sup>149</sup> JOHN ADAMS, 3 *A DEFENCE OF THE CONSTITUTIONS OF THE UNITED STATES OF AMERICA* 210-11 (Union, N.J.: The Lawbook Exchange, 2001)(1<sup>st</sup> pub. Philadelphia, 1797).

<sup>150</sup> *Id.*, at 210.

## B. The Parisians

Long before Calvinists in Geneva began drawing on Catholic resistance theory, Catholic scholars in Paris had been extending the work of the Scholastics, and studying the questions of legitimate resistance to authority.

Jean Petit, Master of the University of Paris, defended the 1407 assassination of the Duke of Orleans as legitimate tyrannicide. He offered the broadest possible theory: “It is lawful for any subject, without order or command, according to moral, divine, and natural law, to kill or cause to be killed a traitor or disloyal tyrant.”<sup>151</sup>

The most important of the early natural law scholars was Jean Gerson, Chancellor of the University of Paris, and author of several books in the early fifteenth century. In *Vivat Rex* he argued against Petit, and in favor of a narrower doctrine of tyrannicide; under normal circumstances, resistance to a king was sacrilegious, but in extreme circumstances, forceful resistance was legitimate.<sup>152</sup> French Church councils in 1414 and 1415 agreed with Gerson’s refutation of Petit: tyrannicide of a *tyrannos in regime* (a lawful ruler who became a tyrant) required the approval of proper authorities, and ambushes or ruses were impermissible.<sup>153</sup>

Gerson and the councils agreed that in the case of as *tyrannos in titulo* (a tyrant who acquired power illegitimately), individuals had a right of resistance because everyone always retained his or her natural right of self-defense and could use the right to protect the community.<sup>154</sup>

Gerson’s work was refined and extended by Jacques Almain, a Parisian doctor of theology who relied on natural law for his 1512 book *Libellus de Auctoritate Ecclesiae*, arguing that individuals are naturally endowed by God with the right to do whatever they need in order to protect their lives and their well-being. This right included the right to kill an attacker, if necessary.<sup>155</sup>

About a century later, a group of outstanding Spanish theologians and political theorists, including Francisco Suárez, would transmit the work of Gerson and his contemporaries. As a result, these Parisian scholars would “influence the whole subsequent development of Western political theory.”<sup>156</sup>

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<sup>151</sup> Petit, it should be noted, was earning his living on lands given him by the Duke of Burgundy, who had arranged the killing of the Duke of Orleans. Dunbabin, at 494-95; FORD, at 129-32; Palmer-Fernandez, at 435.

<sup>152</sup> Dunbabin, at 494.

<sup>153</sup> Gabriel Palmer-Fernandez, in *ENCYCLOPEDIA OF RELIGION AND WAR* 435 (ed., Gabriel Palmer-Fernandez) (N.Y.: Routledge, 2004), discussing the Council of Faith held in Paris in 1414, and the General Council of the Church held in Constance in 1415. Gerson argued that Petit’s looser standard on resistance promoted lawlessness. Dunbabin, at 495.

<sup>154</sup> Palmer-Fernandez, at 435; BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS* 232 (1997), citing Jean Gerson, *De Vita Spirituali Animae*, in 3 *OEUVR*ES 152, and *De Aufferiabilate Sponsi* (1409), in 3 *OEUVR*ES COMPLETES 300.

<sup>155</sup> J.H. Burns, *Scholasticism: Survival and Revival*, in *CAMBRIDGE 1450-1700*, at 148. Gerson, Almain, and John Major were collectively labeled the “school of Paris.” VAN KLEY, at 214.

<sup>156</sup> TIERNEY, at 233.

### C. The Spanish Second Scholastics

The “second Scholasticism” flowered in Spanish universities in the sixteenth and seventeenth centuries. Many of the scholars from this period are to this day of great interest to scholars and political thinkers in the Spanish-speaking world.

In 1599 the Jesuit Juan de Mariana penned *De Rege et Regis Institutione* (The King and the Education of the King) and placed little emphasis on the Pope’s authority over the king. Mariana emphasized instead the people’s authority over the king. If a tyrant prevented intermediate bodies, such as the French estates or the Spanish *cortes*, from assembling, a private individual would have a right to kill the tyrant.<sup>157</sup> Marianna, who also wrote a famous book accusing the Spanish monarchy of robbing the people by debasing the currency, was called “the prophet of tyrannicide.” The Jesuits were, with some justice, considered subversive of existing governments.<sup>158</sup>

Francisco de Vitoria argued that the Spanish had no right to enslave or take the property of Indians in the New World. That the Indians were pagans did not deprive them of their natural rights. At the same time, the Spanish had a right, indeed a moral duty, to intervene to protect the Indians who would otherwise become victims of cannibalism or human sacrifice.<sup>159</sup> (The priests of Aztec Empire murdered many thousands of people every year by ripping out their living hearts. Children were the favorite “sacrifice” of these bloodthirsty priests. The priests also liked to flay their victims, so the priests could wear the victims’ skins. One reason that Mexico fell so rapidly to Cortes and the Spanish was that the other Indian tribes of Mexico, who had lost the Flower Wars with the Aztecs and were being forced to supply victims for the Aztec death cult, eagerly joined forces with the Spanish liberators.<sup>160</sup>)

Elaborating on Thomas Aquinas’s analysis of self-defense, Vitoria distinguished what a person “wills” from what a person “intends.” A person suffering from gangrene might “will” that his arm be amputated, but he does not “intend” for the arm to be amputated. Likewise, a person who is defending himself might “will” the death of the assailant, but not “intend” the death.<sup>161</sup>

The right of self-defense included the right of a child to defend himself against a homicidal father, the right of a subject to defend himself against a homicidal king (as long as the defense would not produce chaos in the kingdom), and even the right of self-defense against an evil pope.<sup>162</sup> Deadly force was permissible, if necessary, to prevent a

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<sup>157</sup> J.H.M. Salmon, *Catholic Resistance Theory, Ultramontism, and the Royalist Response, 1580-1620*, in *CAMBRIDGE 1450-1700*, citing JUAN DE MARIANA, *DE REGE ET REGIS INSTITUTIONE* (The King and the Education of Kings)(1599), book 2, ch. 6, at 75-77. Mariana praised the (deranged) Dominican monk Jacques Clément who had assassinated France’s King Henry III in 1589. Gabriel Palmer-Fernandez, *Tyrannicide, Medieval Catholic Doctrine of*, in *ENCYCLOPEDIA OF RELIGION AND WAR*, at 434-35.

<sup>158</sup> Salmon, at 241.

<sup>159</sup> TIERNEY, citing VITORIA, *DE TEMPERANTIA IN OBRAS DE FRANCISCO DE VITORIA* (ed., T. Urdanoz) (Madrid: 1960).

<sup>160</sup> During the 1487 rededication of the Great Temple in Tenochtitlan, 80,400 victims were slaughtered in human sacrifice. Ross Hassig, *Azetics*, in *ENCYCLOPEDIA OF RELIGION AND WAR*, at 30.

<sup>161</sup> FRANCISCO DE VITORIA, *ON HOMICIDE & COMMENTARY ON SUMMA THEOLOGIAE IIA-IIAE Q. 64, Article 7* (of *Commentary on Summa*), item 2, at 193-95 (transl., John P. Doyle)(1997).

<sup>162</sup> VITORIA, *COMMENTARY ON SUMMA*, Article 7, item 3, at 195-97; TIERNEY, at 296, citing Vitoria, *De Potestate Papae et Concilii*, in *OBRAS* (evil pope).

major robbery, but not a trivial one.<sup>163</sup> Vitoria acknowledged that preemptive self-defense—striking first at a person who was plotting a deadly attack—was a doctrine that could easily be misused; Vitoria allowed preemption only when the person had “scientific certitude” that the other person would eventually attack.<sup>164</sup>

However, a person is not obliged to defend himself, Vitoria wrote. A victim could charitably refuse to defend himself, because he knows that if the attacker is killed, the attacker will be damned straight to hell.<sup>165</sup>

Vitoria conceded the authority of a king to restrict hunting, but he wrote that “it is tyrannical” for lesser magistrates to “to make laws concerning the appropriation of wild animals against the people’s liberty to hunt because wild animals are common to all. On the contrary, princes should rather defend this liberty.”<sup>166</sup>

Some lords said that they were doing their subjects a favor by preventing them from hunting: hunting wasted time which could more productively be spent on farming. Vitoria countered that the lords were guilty of “sinning mortally” by taking away freedom, “because liberty is more useful than any private good,” including food.<sup>167</sup>

Based at the University of Salamanca, the Jesuit Francisco Suárez was widely recognized as one of the preeminent scholars of his age, and one of the founders of international law. He authored fourteen books on theological, metaphysical, and political subjects. Like Aquinas, he was originally considered a slow learner.<sup>168</sup>

One of the important issues of the day was the ownership of property by Franciscan monks, the Order founded by St. Francis of Assisi. Franciscans renounced all property. So if a person saw a Franciscan using a pen and paper to write an essay, would the person commit injustice if he took away the Franciscan’s paper and pen—since the Franciscans did not have “ownership” of anything?

Suárez explained the error of such thinking. Even without owning property, Franciscan monks had a natural right of self-defense of their own bodies, and correlative a natural right to defend the things they used.<sup>169</sup>

The Scholastics agreed that people were born free.<sup>170</sup> Hence, submission to government was based only on consent. In book four of the multi-volume *De Legibus ac*

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<sup>163</sup> VITORIA, COMMENTARY ON SUMMA, Article 7, item 6, at 199-201.

<sup>164</sup> *Id.*, Article 7, item 8, at 201-203.

<sup>165</sup> *Id.*, Article 7, items 4-5, at 197-99.

Domingo de Soto was the leading scholar of the School of Salamanca in the mid-sixteenth century. On issues of community defense and self-defense, Soto came to the same results as Vitoria. ANABEL S. BRETT, LIBERTY, RIGHT AND NATURE: INDIVIDUAL RIGHTS IN LATER SCHOLASTIC THOUGHT, 139-40 (2003). Regarding the individual who was attacked by a robber, Soto emphasized that the victim had a natural right to self-defense. And because the right belonged to the victim, the victim necessarily had the option to renounce the right. Soto argued that a community had the right compel a member to help defend the community, but did not have the power to sacrifice an individual—such as by surrendering some citizens to a cruel tyrant who was besieging a city, and demanding that a certain number of victims be given over to him. *Id.*, at 160-64, citing DOMINGO DE SOTO, DE IUSTITIA ET IURE LIBRI DECIM (Ten Books on Justice and Right) (Salamanca: 1553-54), book 5, Questions 1, 2, & 64.

<sup>166</sup> BRETT, at 132, quoting FRANCISCO DE VITORIA, COMMENTARIOS A LA SECUNDAE DE SANTO TOMÁS 64.1.5 (ed., V. Beltrán de Heredia) (Salamanca: 1934).

<sup>167</sup> BRETT, at 132, quoting VITORIA, COMMENTARIOS A LA SECUNDAE DE SANTO TOMÁS, 64.1.5 note 9.

<sup>168</sup> TIERNEY, at 301.

<sup>169</sup> *Id.*, at 308, citing Suárez, *De Statu Perfectionis*, in OPERA OMNIA (ed., L. Vivès) (Paris: 1858).

<sup>170</sup> JOHN COFFEY, POLITICS, RELIGION AND THE BRITISH REVOLUTIONS: THE MIND OF SAMUEL RUTHERFORD 158 (2002).

*Deo Legislatore*, Suárez argued that a prince had just power only if the power was bestowed by the people.<sup>171</sup>

Self-defense, said Suárez, was “the greatest of rights,” a right which belonged to individuals and to communities. This right of self-defense included a right of defense against tyrants.<sup>172</sup>

The last of Suárez’s books was *De Defensio Fidei Catholicae Adversus Anglicanae Sectae Errores*, published in 1613. He directly challenged the English King James I’s assertion of divine right. *De Defensio* was publicly burned in London in 1614. Suárez’s analysis of the right of revolution was so powerful that the Catholic *Parlement* in Paris burned the book the same year.<sup>173</sup>

According to *De Defensio*, in the case of a pure usurper—a tyrant without title—a private person could kill the tyrant. The individual would not be usurping the role of the government. Rather he would be participating in the defense of the community, pursuant to the God-given power to defend innocents.<sup>174</sup>

If a legitimate king made actual war upon his own people, then individuals would have a similar right to resist.

What if a legitimate king ruled tyrannically, but without constant violence against the people? Then, an individual could resist only to defend his own life. Any other resistance would have to await the community’s decision to exercise its own natural right of self-defense, and to enforce the king’s contractual obligation to govern “politically not tyrannically.” A “public council” could assemble and authorize forceful removal of the tyrant.<sup>175</sup>

The Pope had the right to depose a king “directly” if the king committed a spiritual crime, such as blasphemy or heresy. The Pope’s power to depose included the power to authorize private individuals to kill the king. For temporal crimes, such as robbing the people, the Pope could condemn the crimes, and could give his approval when the people removed the king.<sup>176</sup>

According to the great British historian Lord Acton, “the greater part of the political ideas” of John Milton and John Locke “may be found in the ponderous Latin of Jesuits who were subjects of the Spanish Crown,” such as Mariana and Suárez.<sup>177</sup>

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<sup>171</sup> Salmon, at 238, citing 4 SUÁREZ, DE LEGIBUS AC DEO LEGISLATORE § 2, at 123 (Coimbra: 1612).

<sup>172</sup> TIERNEY, at 314.

<sup>173</sup> Salmon, at 252. The previous year, the *Parlement* and Pope Paul V had censored Martin Becan’s *Controversia Anglicana de Potestate Pontificis et Regis*, a book which supported Robert Bellarmine’s view that English Catholics should not take the oath of allegiance to James I. *Id.*, at 252, 661. The Jesuit Robert Parson, writing under the pseudonym R. Doleman, asserted that the English people had the right to choose their own government and to overthrow tyrants in *A Conference about the Next Succession to the Crowne of England* (1594). See ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 9, n. 4 (ed., Thomas G. West) (Indianapolis: Liberty Fund, 1996) (editor’s note).

<sup>174</sup> TIERNEY, at 314, citing *Defensio Fidei Catholicae* and *De Charitate*.

<sup>175</sup> *Id.*, at 314; Howell A. Lloyd, *Constitutionalism*, in CAMBRIDGE 1450-1700, at 295.

<sup>176</sup> *Id.*, at 314-15.

<sup>177</sup> Alejandro A. Chafuen, *Book Review: Liberty, Right, and Nature: Individual Rights in Scholastic Thought*, 3 MARKETS & MORALITY (Spr. 2000, no. 1),

[http://www.action.org/publicat/m\\_and\\_m/2000\\_spring/chaufen.html](http://www.action.org/publicat/m_and_m/2000_spring/chaufen.html). Some of the Salamanca theories were put into practice in 1640, when the rural population of Catalonia, Spain, formed a “Christian army” to protect their rights from invasion by the central government in Madrid. Among their grievances were the billeting of soldiers in home, and excessive taxation to pay for imperial adventures. Although France gave limited support to Catalonia, the rebellion was finally suppressed after 11 years of war. MONOD, at 161-65.

## Conclusion

Scholars of the American Revolution and of the Second Amendment are used to looking at the closest intellectual ancestors of the Founders—especially at John Locke and Algernon Sidney, and also at the many other English authors from the sixteenth and seventeenth centuries who articulated a right to armed revolution in order to vindicate the natural right of self-defense. Although King George III reportedly denounced the American War of Independence as “a Presbyterian rebellion,” it seems that American principle of justified revolution has very strong Catholic roots. When Pope Gregory launched the Papal Revolution, he had no idea that there was an American continent, let alone that he was unleashing ideas which, after centuries of development, would mature into an American Revolution. One of the values of understanding the debt that the Declaration of Independence and the Second Amendment owe to the *Summa Theologica*, to *Policraticus*, and to the other great works of Catholic resistance theory is that we can better understand that the American principles of revolution and the right to arms are not novelties that spontaneously arose in 18<sup>th</sup>-century America or in 17<sup>th</sup>-century Great Britain. Rather, they are the natural results of an intellectual tradition that was in many ways far older and broader—and much more Catholic—than the American Founders may have realized.