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The Judge's Conscience and the Protection of the Criminal Defendant: Moral Safeguards against Judicial Arbitrariness

I. Introduction*

'Judge according to the laws and observe the order of legal process', thus admonishes the Antwerp-born theologian Leonard Lessius (1554–1623) in his treatise *On justice and right*.¹ This brief, aphoristic statement from Lessius' discussion on abuse of judicial power appears to contain two of the main safeguards against arbitrary adjudication: the legality principle ('*secundum leges iudicandum*') and due process ('*servetur ordo iuris*'). In fact, a similar plea against judicial arbitrariness can be found already in Gratian's *Decretum* (c. 1140). Drawing on Saint Ambrose, Gratian insists that judgments should not be rendered according to the judge's arbitrary will, but according to the laws and the merits of the case.² The question arises then, to what extent the protection of the accused from the whims of the judge's *arbitrium* is a new and modern privilege, acquired only over the last two centuries by citizens living under the empire of a criminal code thanks to Enlightenment philosophers such as Cesare Beccaria (1738–1794).³

* The author wishes to thank James Q. Whitman for his stimulating comments on the draft version of this paper.

¹ Lessius, Leonard: *De iustitia et iure ceterisque virtutibus cardinalibus*, Paris, 1606 (edition available online in The Digital Library of the Catholic Reformation), p. 334 (bk. 2 ch. 29 dub. 6 num. 48).

² C. 3 q. 7 c. 4: '*Bonus iudex nihil ex arbitrio suo facit et domesticae proposito voluntatis, sed iuxta leges et iura pronunciat, scitis iuris obtemperat, non indulget propriae voluntati, nihil paratum et mediatum de domo defert, sed sicut audit, ita iudicat, et sicut se habet natura, decernit; obsequitur legibus, non adversatur, examinat causae merita, non mutat.*' All citations from the *Corpus Iuris Canonici* are taken from the Friedberg edition, Friedberg, émile: *Decretum magistri Gratiani*. Ed. Lipsiensis secunda post Aemilii Ludovici Richter curas ad librorum manu scriptorum et editionis Romanae fidem recognovit et adnotatione critica instruxit Aemilius Friedberg, Leipzig, 1879, available online at <http://geschichte.digitale-sammlungen.de/decretum-gratiani/online/angebot>.

³ For a critical assessment of the negative connotation the term 'judicial discretion' (*arbitrium*) acquired during the eighteenth century, see *Sbriccoli*, Mario: Beccaria

Drawing lessons from recent scholarship on the scholastic, theological roots of the criminal law,⁴ this contribution proposes to ask the question whether the judges' preoccupation with the salvation of their souls may have provided an alternative to a codified legality principle. As James Whitman has shown, the pre-eminent concern for the salvation of the soul inspired judges' fear when it came to deciding over the lives of others. Christians were reluctant to inflict capital punishments and to shed blood (*ecclesia abhorret a sanguine*)⁵ – at least in principle.⁶ Seeking to open up new ways for further research rather than giving definitive answers, the aim of this paper is to draw attention to what the moral theologians had to say about the criminal trial. More particularly, Max Radin's advice will be heeded that – for many centuries – not only lawyers but also Churchmen vigorously debated the question whether either legitimate proof or the judge's conscience should have the last say in determining the fate of the criminal defendant.⁷

ou l'avènement de l'ordre. Le philosophe, les juristes et l'émergence de la question pénale, in: Porret, Michel (ed.), *Beccaria et la culture juridique des Lumières*, Actes du colloque européen de Genève, 25–26 novembre 1994, Geneva, 1997, p. 177–87, who distinguishes between an age-old, positive notion of *arbitrium* as 'constructive discretion' versus Beccaria's tendentious and pejorative notion of *arbitrium* as 'destructive discretion'. The modern origins of the negative connotations of *arbitrium* are also highlighted in *Schnapper*, Bernard: *Les peines arbitraires du XIIIe au XVIIIe siècle* (doctrines savantes et usages français), in: *Tijdschrift voor Rechtsgeschiedenis*, 41, 1973, p. 237–77, and 42, 1974, p. 81–112, and *Meccarelli*, Massimo: *Arbitrium. Un aspetto sistematico degli ordinamenti giuridici in età di diritto comune*, Milan, 1998, p. 45. Interestingly, *Schnapper*, *Les peines arbitraires*, p. 81 recalls us that the use of *arbitrium* was mostly in favor of the accused. Moreover, in a couple of contributions on the criminal defendant's right to be considered innocent until proven guilty, Kenneth Pennington has left us one example among many that should remind us that some of the most fundamental maxims in favor of the accused reaches back to the very romano-canonical tradition which Beccaria would have us despise, cf. *Pennington*, Kenneth: *Innocente fino a prova contraria: le origine di una massima giuridica*, in: Cito, Davide (ed.), *Processo penale e tutela dei diritti nell'ordinamento canonico*, Milan, 2005, p. 33–61, especially p. 42–61.

⁴ See *Maihold*, Harald: *Strafe für fremde Schuld ? Die Systematisierung des Strafbegriffs in der Spanischen Spätscholastik und Naturrechtslehre*, in: *Konflikt, Verbrechen und Sanktion in der Gesellschaft Alteuropas. Symposien und Synthesen*, IX, Cologne, 2005; *Whitman*, James Q.: *The Origins of Reasonable Doubt. Theological Roots of the Criminal Trial*, New Haven-London, 2008. The interconnectedness between religion and the criminal law in the Early Modern period is also subject to careful scrutiny in *Pihlajamäki*, Heikki: *Executor divinarum et suarum legum: Criminal Law and the Lutheran Reformation*, in: *Mäkinen, Virpi* (ed.), *Lutheran Reformation and the Law*, in: *Studies in Medieval and Reformation Traditions*, CXII, Leiden-Boston, 2006, p. 171–204, and *Agüero*, *Las penas impuestas por el Divino y Supremo Juez*.

⁵ *Monballyu*, Jos: *Zes eeuwen strafrecht. De geschiedenis van het Belgische strafrecht (1400–2000)*, Leuven, 2006, p. 77.

⁶ *Monballyu*, *Zes eeuwen strafrecht*, p. 144–7.

⁷ *Radin*, Max: *The Conscience of the Court*, in: *The Law Quarterly Review*, 48, 1932, p. 506–20, especially p. 508.

The conclusion of this paper will be that the emphasis on the judge's *arbitrium* in the pre-Beccaria era need not necessarily have led to an arbitrary judicial system denying fundamental rights to the criminal defendant. This point will be made in three steps. Firstly, the theologians' engagement with judging and criminal law will be illustrated. Firmly rooted in the *ius commune* tradition, they sought to enforce its moral foundations through the forum of conscience. Secondly, it will be explained why Thomas Aquinas' theology of judging was so legalistic. Arguments of moral safety and security of the public order led Thomas and his followers to argue – quite paradoxically at first sight – that the outcome of the legitimate procedural order should prevail over the judge's 'conscience'. Thirdly, it will be shown how the protection of the criminal defendant was maximized at the outset of the seventeenth century through the slight qualification of the moral rules which were established to guide the judge's conscience.

II. Theologians, the Morality of Judging, and Criminal Law

The fact that theologians were preoccupied with judging, criminal trials and the conscience of the judge might stir surprise. Is not law the realm of confessional neutrality and professional jurists? Is not there a strict separation between law and morality, let alone law and religion? These and similar positivistic assumptions tend to form an obstacle to gaining a full, historical understanding of what was going on in Medieval and Early Modern societies.⁸ As Max Weber (1864–1920) noted, modern man seems to be unable to escape the tendency to underestimate the impact of religion in times past.⁹ It is indispensable, therefore, to emphasize that the concerns of the deeply religious European societies until at least the 18th century were quite different from our own.¹⁰ It turns out that even jurists in periods closer to us than the Middle Ages were still sufficiently worried about the conscience of the participants in a trial to spill ink on the subject.¹¹

⁸ See the critical observations in *Hespanha*, Antonio: Panorama histórico da cultura jurídica europeia, Lisboa, 1997, p.16–22. Compare *Agüero*, Alejandro: 'Las penas impuestas por el Divino y Supremo Juez.' Religión y justicia secular en Córdoba del Tucumán, siglos XVII y XVIII, in: Anuario de historia de América Latina, 46, 2009, p. 203–30, quote p. 230: 'Religión, derecho, jurisdicción eclesiástica, fuero penitencial, fuero externo eclesiástico, justicia real y jurisdicción criminal conforman un complejo puzzle cultural que, quizás, no podamos comprender cabalmente si miramos sus diversas piezas de forma aislada.'

⁹ Quoted in *Clavero*, Bartolomé: Religión y derecho. Mentalidades y paradigmas, in: Historia, Instituciones y Documentos, 11, 1984, 67–92, especially p. 92.

¹⁰ *Bergfeld*, Christoph: Katholische Moraltheologie und Naturrechtslehre, in: Coing, Helmuth (ed.), Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte, Band II: Neuere Zeit (1500–1800). Das Zeitalter des gemeinen Rechts, Teilband I: Wissenschaft, München, 1973, p. 999–1015, especially p. 999.

One of the many verses taken from the Gospel that may have inspired judges to ponder the complexity of their task is Matthew 7:1 (*Judge not, that you be not judged*).¹² Judging was perceived as a dangerous job. While the judge was running the show on earth, he was himself subject to interrogation on the day of Last Judgment. The iconography of the paintings in court rooms across European cities is there to remind us – and the judge – that, ultimately, the soul is accountable for its acts to God.¹³ References to the divinity of the judicial office were there probably not only to reinforce the judge's divine prestige, but also to reinforce his divine duties.¹⁴ Concretely, the soul of the judge risked eternal damnation in case he convicted an innocent defendant. This led to a substantial amount of anxiety among Christian judges. Hence, many elements in criminal procedure were devised to satisfy the judge's search for moral comfort. The appearance of the jury in the common law systems and the use of witnesses on the continent are but some of the most manifest by-products of the culture of fear surrounding the job of judging.¹⁵ Through these comforting procedures, the burden of moral responsibility was shifted from the judge to a group of witnesses or jurors.¹⁶

Against this background of religious anxiety about judging, it is less surprising to find that dozens of theologians and confessors were called upon to provide judges with spiritual guidance. Even if we only concentrate on the Catholic side of the early modern penitential literature, the sheer volume of treatises that deal with the morality of judging, along a plethora of other subjects, is

¹¹ As is testified by the following dissertation defended under Samuel Stryck's (1640–1710) promotorship: *Disputatio juridica de conscientia partium in judicio, quam (...) praeside Samuele Strykio (...) placido eruditorum examini submittit* Johannes Christianus John, Francofurti ad Viadrum, 1677.

¹² Whitman, *The Origins of Reasonable Doubt*, p. 3.

¹³ Among the abundant literature on the iconography of justice in courts, see *Martyn*, Georges: *Het oordeel van Salomon van de Gentse Oudburg*, in: *Pro Memorie. Bijdragen tot de rechtsgeschiedenis der Nederlanden*, 12, 2010, 103–19; *Martyn*, Georges: *Painted Exempla Iustitiae* in the Southern Netherlands, in: Schulze, Reiner (ed.), *Symbolische Kommunikation vor Gericht in der Frühen Neuzeit*, in: *Schriften zur Europäischen Rechts- und Verfassungsgeschichte*, LI, Berlin, 2006, p. 335–56, especially p. 339–46; *Jacob*, Robert: *Images de la justice. Essai sur l'iconographie judiciaire du Moyen Âge à l'âge classique*, Paris 1994.

¹⁴ *Thireau*, Jean-Louis: *Le bon juge chez les juristes français du XVIe siècle*, in: Carbasse, Jean-Marie / Depambour-Tarride, Laurence (eds.), *La conscience du juge dans la tradition juridique européenne*, Paris, 1999, p. 131–154, especially p. 132.

¹⁵ Whitman, *The Origins of Reasonable Doubt*, chapter 4 (*Salvation for the Judge, Damnation for the Witnesses: the Continent*), p. 91–124, and chapter 5 (*Salvation for the Judge, Damnation for the Jury: England*), p. 125–158.

¹⁶ Whitman, *The Origins of Reasonable Doubt*, p. 13–14, draws a compelling parallel here with the moral comforting procedure implicit in the use of firing squads for the execution of people: each member can escape the sense of moral responsibility for having killed a person, since he does not know whether it was he who fired the fatal shot.

impressive.¹⁷ Another part of the explanation of why the theologians devoted so much energy to the morality of trials and judgment in general, is that these topics had already formed the subject of debate in Thomas Aquinas' (1225–1274) *Summa Theologiae*. Question 60 of the *Secundae Secundae*, comprising no less than six articles, is entirely dedicated to judging (*de iudicio*). Characteristically, the second article deals with the question whether it is lawful to judge in the first place. Thomas concludes that it is lawful for a Christian to become a judge.¹⁸ He infers this from a passage in the Old Testament ordering that judges and magistrates be appointed in all towns to render just judgment on the people (*Deuteronomy* 16:18).

Francisco de Vitoria (1483/1492–1546) and Domingo de Soto (1495–1560), the famous Dominican friars from the Convent of San Estebán who taught theology at the University of Salamanca, are held among the most prominent commentators of Thomas Aquinas in the early modern period.¹⁹ Faithfully following the structure of Thomas' *quaestio* 60, Vitoria came up with a commentary counting no less than twenty pages in its modern edition.²⁰ This was largely due to his lengthy discussion of the continuing problem of the judgment on suspicion (*iudicium temerarium*) – a judgment made too lightly.²¹ Domingo de Soto also remained quite faithful to the pattern of Thomas' exposition, but his ten-book treatise *On justice and right* (*De iustitia et iure*) was the first of what would become a successful literary genre which did not present itself as a simple, line by line, commentary on the *Secunda Secundae*.²² Still, an overview of the articles in the fourth question of books three (*On justice*) and five (*On injustice*) of his

¹⁷ For an overview, see *Turrini*, Miriam: *La coscienza e le leggi. Morale e diritto nei testi per la confessione delle prima età moderna*, Bologna, 1991, and *Bergfeld*, Katholische Moraltheologie, p. 999–1015. A good impression of the early modern literature dealing with criminal matters, including moral theological literature, can be gained from *Maihold*, *Strafe für fremde Schuld?*, p. 66–99. Indispensable background reading about the centuries-long struggle of secular authorities to neutralize the parallel jurisdiction exercised by confessors through the *forum internum*, see *Prodi*, Paolo: *Una storia della giustizia. Dal pluralismo dei fori al moderno dualismo tra coscienza e diritto*, Bologna, 2000.

¹⁸ *Aquinas*, Thomas: *Summa Theologiae* (the standard edition commissioned by Pope Leo XIII is available online at www.corpusthomicum.org), IIaIIae q. 60 a. 2.

¹⁹ On the renewal of theology at Salamanca and its consequences for legal and economic thought, see *Belda Plans*, Juan: *La escuela de Salamanca y la renovación de la teología en el siglo XVI*, in: *Biblioteca de Autores Cristianos Maior*, LXIII, Madrid, 2000, *passim*.

²⁰ *Vitoria*, Francisco: *De iustitia* (ed. *Beltrán de Heredia*, Vicente: Madrid, 1934), tom. I, 2.2. aa. 57–66, p. 35–54.

²¹ This must be seen against the context of moral probabilism, which falls outside the scope of the present paper. The standard work on the history of probabilism is now *Schüßler*, Rudolf: *Moral im Zweifel*, Band I: *Die scholastische Theorie des Entscheidens unter moralischer Unsicherheit*, and Band II: *Die Herausforderung des Probabilismus*, Paderborn, 2003–2006. See also *Whitman*, *The Origins of Reasonable Doubt*, *passim*.

De iustitia et iure illustrates how indebted the structure of his thought remained to Thomas Aquinas:²³

Bk. 3 q. 4 (<i>On judgment</i>) ²⁴	Bk. 5 q. 4 (<i>On judicial injustice</i>) ²⁵
Art. 1: Is judging an act of justice? Art. 2: Is judging licit? Art. 3: Is judging on suspicion licit? Art. 4: Should doubts be interpreted favorably? Art. 5: Should judgment always be based on the written laws? Art. 6: Is a usurped judgment always perverted?	Art. 1: Can a judge licitly judge one who is not his subject? Art. 2: Is it licit for a judge to judge against the truth which he knows with certainty, if the opposite is legitimately proved? Art. 3: Can he judge one has not been accused? Art. 4: Can a judge remit the legally prescribed punishment?

In the footsteps of Thomas and Vitoria, Soto typically examined the deontology of all of the parties involved in a trial, viz. not only of the judge, but also of the plaintiff, the defendant, the witnesses, and the lawyer.²⁶ This would remain a standard part of theologians' discussion of the morality of judicial proceedings. For example, Lessius devoted the entire fourth section of the second volume of his *De iustitia et iure* to injustice in the courts, successively treating of the judge (chapter 29), the accuser and the witnesses (chapter 30), and the defendant and his attorney (chapter 31).²⁷ His compelling account of judicial morality was clearly the largest among those chapters and contained no less than eighteen problems or *dubitaciones*. The persistent problem of judgment on suspicion inspired Lessius to tackle the additional question of whether doing so despite doubt or on the strength of temerarious suspicions constitute mortal sin (*dubitatio* 3). Usurpation by judges seems to have been such a widespread phenomenon that it became the subject of intense reflection in no less than three lengthy questions which did not yet figure as such in Thomas or Soto (*dubita-*

²² See the overview of treatises *On justice and right* in *Folgado*, Avelino: Los tratados *De legibus* y *De iustitia et iure* en los autores españoles del siglo XVI y primera mitad del XVII, in: *La Ciudad de Dios*, 172.3, 1959, p. 275–302, especially p. 284–291.

²³ Soto, Domingo de: *De iustitia et iure*, Antwerp, 1568 (edition available online in The Digital Library of the Catholic Reformation), p. 79v-85r (bk. 3 q. 4) and p. 154v-158r (bk. 5 q. 4).

²⁴ Compare with the identical structure of Thomas Aquinas' *Secunda Secundae*, question 60.

²⁵ Compare with the identical structure of Thomas Aquinas' *Secunda Secundae*, question 67.

²⁶ Soto, *De iustitia et iure*, p. 158r-171r (bk. 5 q. 5–8). Compare Aquinas' *Secunda Secundae*, questions 68–71.

²⁷ Lessius, *De iustitia et iure*, p. 327–56 (ch. 29), p. 357–64 (ch. 30) and p. 364–71 (ch. 31).

tiones 7–9). Probably Lessius was influenced here by Molina's (1535–1600) impressively comprehensive and detailed analysis of jurisdiction, judicial power, and the correct distribution of power in the political community in general.²⁸ In the context of his treatment of justice in exchange regarding goods such as honor and fame, Molina had also devoted a substantial discussion – again daunting by virtue of its length alone – to the sinfulness of the judgment on suspicion.²⁹ Lessius was undoubtedly familiar with Molina's views as expressed in those *disputationes*.

Of particular interest are Lessius' discussions on the criminal trial, which complete his examination of injustice committed by judges. They are far more elaborated than the fragmentary notes on questions dealing with criminal procedure in Thomas or de Soto.³⁰ First of all, Lessius devoted an independent *dubitatio* (11) to the problem of judges condemning criminal defendants on the basis of their private knowledge without due process. The next *dubitatio* (12) is an introduction to the different forms of criminal procedure, the inquisitorial procedure then constituting the subject of lengthy and detailed treatment (*dubitatio*es 13–16).³¹ The penultimate question (17) offers a particularly thorough debate on the conditions that must be observed for applying torture as a means of proof. For his views on torture, Lessius heavily drew on Antonio Gomezio's (1501–1562/1572) *Variae Resolutiones* and Giulio Claro's (1525–1575) *Practica criminalis*.³² In the last *dubitatio*, Lessius addressed the question what kind

²⁸ Molina, Luis de: *De iustitia et iure*, Cologne, 1613 (edition available online in The Digital Library of the Catholic Reformation), cols. 1425–666 (vol. 6 treat. 5 disput. 1–45). For a first encounter with Molina's and other late scholastics' quite sophisticated theory of jurisdiction and public power, see Meccarelli, Massimo: Ein Rechtsformat für die Moderne: *Lex und Iurisdictio* in der spanischen Spätscholastik, in: Strohm, Christoph/de Wall, Heinrich, Konfessionalität und Jurisprudenz in der frühen Neuzeit, in: Historische Forschungen, LXXXIX, Berlin, 2009, p. 285–311, who convincingly argues that Molina's ideas are modern while still being heavily indebted to the *ius commune*.

²⁹ Molina, De iustitia et iure, cols. 1241–65 (vol. 5 treat. 4 disput. 13–16).

³⁰ For example, Thomas does not discuss torture in his *Summa Theologiae*.

³¹ Insight into the actual functioning of the criminal procedure in the Low Countries during Lessius' time can be gained from Monballyu, Zes *eeuwen strafrecht*, p. 347–63. The author also provides a useful outline of the institutional framework of both secular and ecclesiastical criminal jurisdiction in the Hapsburg Netherlands at the time (p. 70–7).

³² On torture in the *ius commune* and its alleged abolition under Prussia's Frederick the Great, see Schmoeckel, Mathias: Humanität und Staatsraison. Die Abschaffung der Folter in Europa und die Entwicklung des gemeinen Strafprozeß- und Beweisrechts seit dem hohen Mittelalter, Cologne, 2000, p. 237–66 and p. 567–92 respectively. For a critical assessment of Schmoeckel's thesis, see Langbein, John H., *Torture and the Law of Proof. Europe and England in the Ancient Régime*, Chicago, 2006, p. xiii, n. 9. To gain a better understanding of the reality of judicial torture which Lessius is likely to have reflected upon, see Dauchy, Serge: La torture judiciaire dans les anciens Pays-Bas: état de la question, in: Durand, Bernard (ed.), *La torture judiciaire. Approches historiques et juridiques*, Lille, 2002, vol. 2, p. 507–38.

of restitution judges must make to the heirs of the criminal defendant if they have condemned him or her without respecting the rules of due process.

What makes this moral theological literature on judging and criminal law so interesting, is its distinctively juristic nature. This is particularly evident in Francisco Suarez's (1548–1617) exposition on the nature of criminal laws in his systematic treatise *On laws and God the Legislator*.³³ In the eleventh chapter of the fifth book, we find Suarez treating of the question whether the judge is bound to impose exactly that punishment which is prescribed by the criminal law. It may be noted, indeed, that, while some statutes left punishment to the *arbitrium* of the judge, some specified the penalty. Suarez sets out by saying that the penal law which lays down a specific punishment for a specific act is normally not binding for the judge, but only for the subjects of the law. This type of law merely means to instruct the judge.³⁴ However, Suarez then goes on to argue that the judge *is* bound by the law. His argument relies on canonical authority and reason. He quotes canon *In istis* from Gratian's *Decretum* which lays down the principle that one must not judge the law but judge according to the law (*non de legibus sed secundum leges iudicandum*).³⁵ The reason why this is so, is that once equity has been embodied in the law, the judge is bound by that law, because he is the guardian and executor of laws. In one word, the judge is the living law (*animata lex*).³⁶

Suarez's conclusion that the judge is bound by a penal law which prescribes a specific punishment for a certain crime sounds modern. It should not hide the fact, however, that his and the other theologians' engagement with criminal law was still firmly rooted in the *ius commune*. Therefore, the medieval notion of judiciary discretion (*arbitrium*) plays still a very important role in Suarez's exposition, as does the moral notion of Justice as a transcendental norm.³⁷ Indeed,

³³ Suarez, Francisco: *De legibus ac Deo legislatore*, in: *Opera omnia*, Berton, Carolo (ed.), vol. 5, Paris, 1856, p. 412–78 (bk. 5 ch. 1–13) and p. 557–62 (bk. 5 ch. 34).

³⁴ Suarez, *De legibus*, p. 465: '*Nam in superioribus solum diximus, poenam legi apponi ad instruendum iudicem, et hoc sonant jura; ergo non est cur addamus obligationem, quae longe diversa est; praesertim quia in his legibus non solent apponi verba praeceptiva respectu iudicum, sed tantum subditorum; ergo saltem ubi non fuerint expressa, non erit talis obligatio.*'

³⁵ Dist. 4 c. 3: '*In istis temporalibus legibus, quamquam de his homines iudicent, cum eas instituunt, tamen cum fuerint institutae et firmatae, non licebit iudici de ipsis iudicare, sed secundum ipsas*'; referred to in an abbreviated form in Suarez, *De legibus*, p. 466: '*Non licet, inquit, iudici de legibus iudicare sed secundum ipsas.*'

³⁶ Suarez, *De legibus*, p. 466: '*Probatur, quia tenetur servare aequitatem in poena imponenda, cum sit iudex justitiae; haec autem aequitas resultat posita lege: nam ante illam solum erat aequitas naturalis, quam prudenti arbitrio discernere et servare tenetur iudex: posita autem lege, resultat aequitas legalis, quam etiam servare debet, quia est custos et executor legum et quasi animata lex.*'

³⁷ Meccarelli, *Arbitrium*, p. 50 and p. 361.

Suarez succeeds in combining his relatively novel idea with the traditional role attributed to the judge's discretion in imposing punishment by making a subtle distinction between 'natural equity' and 'legal equity'. It clearly appears from Suarez's above-cited text that the ultimate benchmark for determining the rectitude of judicial decision-making and the legal system in general is equity (*aequitas*). Before a law determines exactly what this equity comes down to in a specific case, it is up to the judge's discretion to safeguard equity, which is then called 'natural equity'. This does not mean that natural equity allows a judge to indulge in arbitrariness. On the contrary, the very notion of equity indicates the (moral) limits to judicial discretion.

In a groundbreaking study, Massimo Meccarelli has demonstrated that the fundamental role of the judge's *arbitrium* in the Medieval and Early Modern period does not imply that, until the advent of the Enlightenment, judgments were discretionary in a pejorative sense. He regards the negative semantic evolution from *arbitrium* to arbitrariness as an eighteenth-century phenomenon, largely due to the slightly dishonest polemics of philosophers such as Beccaria.³⁸ Indeed, it may be worthwhile recalling that other eminent scholars argued convincingly that the roots of due process lie precisely in the Romano-canonical procedure of the medieval *ius commune*.³⁹ This can easily be seen from the abundant literature on procedural issues, ranging from Bulgarus' *Ordo iudiciarius* (first half 12th century) to Guillaume Durand's (c. 1230–1296) *Speculum iudiciale*. It has even been suggested that the laws regulating judicial discretion were so strict that romano-canonical procedure was often not received in its entirety because the judges wanted to keep more power for themselves.⁴⁰ Better still, it has been demonstrated that the discretionary power of the criminal judge in determining punishment was enhanced precisely to offset the strict rules on proving the crime.⁴¹

³⁸ Meccarelli, *Arbitrium*, p. 44–5.

³⁹ Amongst many other contributions on the subject, see Fowler-Magerl, Linda: *Repertorien zur Frühzeit der gelehrten Rechte: Ordo iudiciorum vel ordo iudiciarius*, in: *Ius commune*, Sonderhefte, XIX, Frankfurt am Main, 1984, and Pennington, Kenneth: *Due Process, Community, and the Prince in the Evolution of the Ordo iudiciarius*, in: *Rivista internazionale di diritto comune*, 9, 1998, p. 9–47. Important studies on the *ius commune* origins of certain basic rights of the criminal defendants include Helmholz, Richard: *Origins of the Privilege against Self-Incrimination: the Role of the European Ius commune*, in: *New York University Law Review*, 65, 1990, 962–90, and Landau, Peter: *Ursprünge und Entwicklung des Verbotes doppelter Strafverfolgung wegen desselben Verbrechens in der Geschichte des kanonischen Rechts*, in: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Kanonistische Abteilung*, 65, 1970, 124–156.

⁴⁰ Donahue, Charles: *Proof by Witnesses in the Church Courts of Medieval England: an Imperfect Reception of the Learned Law*, in: Arnold, Morris S. et al. (eds.), *On the Laws and Customs of England. Essays in Honor of Samuel E. Thorne*, Chapel Hill, 1981, p. 127–58, especially p. 156.

As Meccarelli argues, the central role of *arbitrium* in the *ius commune* is directly related to the paramount importance of *aequitas* as the value underlying the Christian legal system of the time.⁴² Perhaps it is no coincidence, then, in Meccarelli's view, that the negative evolution in the meaning of both *arbitrium* and *aequitas* occurred simultaneously, namely in the course of the breakdown of the Ancien Regime toward the end of the eighteenth century.⁴³ Meccarelli highlights the teleological nature of law in the *ius commune*. There are certain fixed procedures, there are laws to be followed, but if these means do not serve the ends of Justice anymore, then they subside to the judge's discretion. For example, the principle that one must not judge the rules but render judgment according to the rules is conditional upon the actual attainment of Justice.⁴⁴ By the same token, *ordo iudiciorum* was a relative and not an absolute concept, which was constantly being redefined in practice.⁴⁵ Since natural law and equity are the foundation of the judge's discretionary power, they also define its limits. The *arbitrium* of the judge can never go against the principles of natural law and remains subject to equity.⁴⁶

To come back on Suarez, his discussion brilliantly illustrates this flexible nature of the *arbitrium iudicis* as the key toward upholding equity without degenerating into arbitrariness – at least in theory. Suarez and the *ius commune* share a remarkable capacity for allowing the exception within the system, for integrating the ordinary and the extraordinary within a logical whole. The symbiosis of the rule and the exception hinge on the *arbitrium iudicis*, which holds this system together by reconciling strict law and equity. This is illustrated by the distinction between ordinary and extraordinary punishments.⁴⁷ According to Suarez, the judge is indeed strictly bound by the penal law prescribing a punishment – at least in ordinary situations. Yet he equally endorses the view that the judge maintains a certain amount of discretion to impose extraordinary sanctions if required so by exceptional circumstances.⁴⁸ Importantly, the law itself allows

⁴¹ Schnapper, *Les peines arbitraires, passim*. The same author insists, though, that the *arbitrium* of the judge did not necessarily come down to arbitrariness, cf. p. 271–7.

⁴² E.g. Meccarelli, *Arbitrium*, p. 15.

⁴³ For a detailed description of the evolution of the concept of equity, see Schröder, Jan: *Aequitas* und Rechtsquellenlehre in der frühen Neuzeit, in: *Quaderni fiorentini*, 26, 1997, p. 283–305. On p. 284 the author suggests that equity became problematical as a correction mechanism within the legal system as soon as Jean Bodin and Thomas Hobbes came up with new, more voluntaristic definitions of law which favored political absolutism.

⁴⁴ Meccarelli, *Arbitrium*, p. 323.

⁴⁵ Meccarelli, *Arbitrium*, p. 368.

⁴⁶ Meccarelli, *Arbitrium*, p. 75–6 and p. 118.

⁴⁷ Meccarelli, *Arbitrium*, p. 219 and p. 373.

⁴⁸ Suarez, *De legibus*, p. 466: '*Dices: lex taxans poenam non excludit prudens iudicis arbitrium, ut, si ratione circumstantiarum viderit reum esse dignum graviori poena,*

for this deviation from imposing the ordinary punishment which it describes, since the law is conditional upon ordinary circumstances and cannot exclude that the common good is provided for.

III. The judge's conscience, public order and the moral foundations of legality

The teleological significance of *arbitrium* as the judge's instrument to uphold the values of justice, truth and equity – the ultimate standards to which any Christian legal system must aspire – brings our exposition to bear on the moral universe in which the *ius commune* was embedded. To recall Meccarelli's analysis of *arbitrium*, this meant that the discretionary power of the judge was certainly not without its limits.⁴⁹ Through his *arbitrium*, the judge could go around positive law to assure the most equitable outcome to a trial, but he could not subtract from equity and natural law themselves. As Jacobo Menocchio put it, discretionary procedural power rests on the assumption that equity is observed (*servata aequitate*).⁵⁰ Since the theatre of the trial was staged on the scene of Justice, so to speak, its actors remained confined within the boundaries of the transcendental norms that were seen to be the end of all human justice. It was precisely the theologians who were considered to be the ultimate guardians of those ultimate standards. This might help to explain the abundant moral theological literature on the morality of the trial in the first place.

The place for enforcing natural law and equity was the forum of conscience, also called the internal tribunal or the court of equity (*forum conscientiae sive forum internum sive forum aequitatis*). Its 'judges' were the confessors, who looked after the advice of the moral theologians.⁵¹ Consequently, the judge in the secular court ought to be constrained by the dictates of conscience as spelled out by the theologians. Contrary to present-day conceptions of conscience, con-

possit illam augere. Quod usu etiam observari videtur. Respondeo, imo ad hoc praecipue poni huiusmodi poenas in legibus, ut non maneant arbitrariae, sicut taxantur pretia rerum, ut tollatur arbitraria aestimatio, saltem quoad augmentum pretii. Per hoc autem non tollitur, quominus si delictum habuerit extraordinarias circumstantias, quae illud atrox vel gravissimum reddant, possit iudex prudenti arbitrio illas specialiter punire, quia dignae sunt speciali poena, et hoc non excluditur per legem, quae loquitur de delicto ut ordinare committi solet, et non excludit providentiam ad bonum commune.

⁴⁹ Compare Schnapper, *Les peines arbitraires*, p. 271–277.

⁵⁰ Cited in Cavanna, Adriano: *La conscience du juge dans le stylus iudicandi* du Sénat de Milan, in: Carbasse/Depambour-Tarride: *La conscience du juge*, p. 229–62, especially p. 251, n. 1.

⁵¹ Turrini, Miriam: *Il giudice della coscienza a la coscienza del giudice*, in: Prodi, Paoli/Reinhard, Wolfgang (eds.): *Il concilio di Trento e il moderno*, in *Annali dell'Istituto storico italo-germanico*, XLV, Bologna, 1996, p. 279–94, especially p. 294.

science as a juristic concept from the post-glossators over the early modern jurists and theologians up till French natural lawyers such as Robert-Joseph Pothier (1699–1772) was not thought of in vague, sentimental or exclusively subjective terms. Conscience in the early modern, Catholic world is juristic in nature.⁵² It is governed by experts, particularly theologians, who deduce from natural reason what the theoretical principles of natural law are and what they mean in practical cases.⁵³ It was in large part due to the Protestant reformation that from the seventeenth century onwards a more subjective notion of conscience began to prevail in Western culture.⁵⁴

In the context of judging, ‘conscience’ naturally evokes the question whether a judge must make a decision on the basis of the lawfully established proofs, or if he can also judge on the basis of ‘conscience’. This is an age-old question which is already present in the *Noctes Atticae* of the second century Roman polymath Aulus Gellius.⁵⁵ There, a Stoic philosopher argues that the judge must follow his conscience. Yet in the Middle Ages the standard answer which evolved over times would seem to be the famous maxim that the judge ought to decide according to the evidence presented and not according to ‘conscience’ (*iudex secundum allegata non secundum conscientiam iudicare debet*). However, the apparent simplicity of this maxim does not do justice to centuries of complex debates among civilians, canonists and theologians. To begin with, the Latin word for conscience (*con-scientia*) is ambivalent. It can have a moral connotation, but its basic meaning is simply knowledge (*scientia*). The doctors of the *ius commune* were aware of this ambiguity. They even made puns on it, as is obvious from a passage in the *Summa Coloniensis* (c. 1169) stating that ‘conscience’ should not be followed by the judge since a lot of things happen with ‘conscience’ against ‘conscience’.⁵⁶

⁵² Further details and references in Decock, Wim: Jesuit Freedom of Contract, in: Tijdschrift voor Rechtsgeschiedenis, 77, 2009, p. 423–58, especially p. 431–5.

⁵³ Decock, Wim: From Law to Paradise: Confessional Catholicism and Legal Scholarship, in:

Rechtsgeschiede, 18, 2011, p. 12–34, especially p. 12–20.

⁵⁴ The gradual shift from the objective conception of conscience in the Middle Ages and the early modern Catholic world to a more subjective notion of conscience in Protestant milieus in early seventeenth century England is described with much care in Klinck, Dennis R.: Conscience, Equity and the Court of Chancery in Early Modern England, Farnham, 2010, p. 107–40. Equally helpful for gaining understanding in the increasing subjectivization of conscience in the early modern period is Schüßler, Moral im Zweifel (vol. II), p. 181–236.

⁵⁵ Radin, The Conscience of the Court, p. 512–4.

⁵⁶ Nörr, Knut Wolfgang: Zur Stellung des Richters im gelehrten Prozeß der Frühzeit: *Iudex secundum allegata non secundum conscientiam iudicat*, in: Münchener Universitätschriften, II, München, 1967, p. 52: ‘*Quod iudici non secretum conscientie, set probationum modus in diffiniendo considerandus (...) Multa enim cum conscientia contra conscientiam fiunt.*’

In any case, the maxim *iudex secundum allegata non secundum conscientiam iudicare debet* expresses a feeling shared by at least some of the jurists and theologians that in order not to violate moral conscience – that ultimate check on the legal system – the judge must not follow his ‘conscience’ – which probably means both ‘moral conscience’ and ‘private knowledge’.⁵⁷ This principle goes against the lofty Stoic philosophy promoted in Aulus Gellius’ *Noctes Atticae*, but at least it is likely to have provided the defendant with an indirect, moral safeguard against judicial arbitrariness. The lawfully established procedural evidence must form the basis for judging the case, not the information which the judge gathered by himself, or, for that matter, his personal moral considerations. Azo (d. 1220) famously founded this conclusion on the distinction between the judge as a private person (*ut privatus*) and the judge as a person performing a public office (*ratione officii*).⁵⁸ All the facts known to him only in private are of no relevance in court. This private-public distinction turned out to be highly influential, not only among the jurists, but also among the theologians.

Thomas Aquinas formulated the problem as follows: may a judge decide against the truth which he personally knows on the grounds that the public evidence produced during the trial is different.⁵⁹ Undoubtedly drawing on Azo, he concluded that by virtue of the judge’s public office, he is morally bound to render judgment according to the evidence unless he can find a juridical argument to refute it.⁶⁰ In doing his job, the judge is exercising the power

⁵⁷ Cf. Nörr, *Zur Stellung des Richters*, p. 13. It might be questioned, though, whether the tendency to interpret the maxim *iudex secundum allegata et non secundum conscientiam iudicare debet* in terms of an opposition between ‘law and ‘morality’ does not reveal more about present-day tensions than about the conflict the *ius commune* tried to come to grips with. Arguably, the predominant meaning of the word ‘conscience’ in this context is private knowledge without much reference to moral qualms. For one thing, the juridical system was not thought of as being in opposition to, or entirely separate from, moral considerations, as has been explained above. For another thing, the use of the term ‘conscientia’ in the context of this discussion in the writings of the early modern theologians is plainly ‘private knowledge’.

⁵⁸ Nörr, *Zur Stellung des Richters*, p. 32; Padoa-Schioppa, Antonio: *Sur la conscience du juge dans le ius commune européen*, in: Carbasse/Depambour-Tarride: *La conscience du juge*, p. 95–130, especially p. 107.

⁵⁹ Aquinas, *Summa Theologiae*, IIaIIae, q. 67 a. 2 (*Utrum liceat iudicium ferre contra veritatem quam novit, propter ea quae sibi proponuntur*).

⁶⁰ Aquinas, *Summa Theologiae*, IIaIIae, q. 67 a. 2 co.: *‘Respondeo dicendum quod, sicut dictum est, iudicare pertinet ad iudicem secundum quod fungitur publica potestate. Et ideo informari debet in iudicando non secundum id quod ipse novit tanquam privata persona, sed secundum id quod sibi innotescit tanquam personae publicae. Hoc autem innotescit sibi et in communi, et in particulari. In communi quidem, per leges publicas vel divinas vel humanas, contra quas nullas probationes admittere debet. In particulari autem negotio aliquo, per instrumenta et testes et alia huiusmodi legitima documenta, quae debet sequi in iudicando magis quam id quod ipse novit tanquam privata persona. Ex quo tamen ad hoc adiuvari potest ut districtius discutiat probationes inductas, ut possit earum*

that goes with his public function (*publica potestas*), not his personal power. Consequently, he must not act on the intelligence he gathered as a private person, but on what he has gotten to know as a public person. This public information is available to him through witnesses, deeds and other official documents. Citing the above-mentioned passage from Gratian's *Decretum* (C.3 q.7 c.4), he literally holds that not the judge's private *arbitrium*, but public proofs are what count in court.⁶¹

Again applying the distinction between the private and the public identity of the judge, Thomas simply neutralizes the counter-argument based on the Biblical exhortation that a judge must conform his decision to God's judgment. In Thomas' view, one should not infer from this that a judge has to follow divine truth. Unlike God and Christ, human judges do not judge by virtue of their own power, but by virtue of public power.⁶² Therefore, the judge's standard is public truth, not absolute truth. Thomas Aquinas espouses this view even in the case of an innocent criminal defendant who is the victim of false accusations.⁶³ As we read in the *Summa Coloniensis*, the judge is safe in conscience as long as he finds his judgment on the public evidence, even if that goes against his own 'conscience'. Thomas adopts this standpoint all but unreservedly. If the judge has tried to avoid condemnation by all legal means, the moral responsibility for the condemnation lies with the false witnesses and not with him.⁶⁴

Thomas' emphasis on the judge's duty to decide exclusively on the basis of the evidence presented, precisely as a matter of morality, was astonishingly strong.⁶⁵

defectum investigare. Quod si eas non possit de iure repellere, debet, sicut dictum est, eas in iudicando sequi.'

⁶¹ Aquinas, *Summa Theologiae*, IIaIIae, q. 67 a. 2 s.c.: '*Sed contra est quod Augustinus dicit, super Psalt., bonus iudex nihil ex arbitrio suo facit, sed secundum leges et iura pronuntiat. Sed hoc est iudicare secundum ea quae in iudicio proponuntur et probantur. Ergo iudex debet secundum huiusmodi iudicare, et non secundum proprium arbitrium.*'

⁶² Aquinas, *Summa Theologiae*, IIaIIae, q. 67 a. 2 ad 2 et 4: '*Ad secundum dicendum quod Deo competit iudicare secundum propriam potestatem. Et ideo in iudicando informatur secundum veritatem quam ipse cognoscit, non secundum hoc quod ab aliis accipit. Et eadem ratio est de Christo, qui est verus Deus et homo. Alii autem iudices non iudicant secundum propriam potestatem. Et ideo non est similis ratio. (...) Ad quartum dicendum quod homo in his quae ad propriam personam pertinent, debet informare conscientiam suam ex propria scientia. Sed in his quae pertinent ad publicam potestatem, debet informare conscientiam suam secundum ea quae in publico iudicio sciri possunt, et cetera.*'

⁶³ Whitman, *The Origins of Reasonable Doubt*, p. 92 and p. 113.

⁶⁴ Aquinas, *Summa Theologiae*, IIaIIae, q. 64, a. 6 ad 3: '*Ad tertium dicendum quod iudex, si scit aliquem esse innocentem qui falsis testibus convincitur, debet diligentius examinare testes, ut inveniat occasionem liberandi innoxium, sicut Daniel fecit. Si autem hoc non potest, debet eum ad superiorem remittere iudicandum. Si autem nec hoc potest, non peccat secundum allegata sententiam ferens, quia non ipse occidit innocentem, sed illi qui eum asserunt nocentem.*'

⁶⁵ Padoa-Schioppa, *Sur la conscience du juge*, p. 109.

Hostiensis, the most important contemporary canonist, did not go as far.⁶⁶ He thought that the judge should be allowed to deviate from the evidence if he was plagued by serious qualms of conscience. A more radical solution was proposed by John Wycliffe (c. 1330–1384), the ‘morning star of the Reformation’.⁶⁷ His rigorist argument that a judge should rather lay down his office than convict an innocent defendant against his conscience became the standard opinion in the English reformed tradition.⁶⁸ Interestingly, this would lead seventeenth century Puritans to rebuke the reinforced Thomistic positions taken by the majority of the sixteenth century Catholic Spanish moral theologians. For example, in his *Cases of Conscience, Practically Resolved*, Joseph Hall (1574–1656) accused Domingo de Soto with pusillanimity for not urging the judge to undergo the death penalty himself rather than to inflict it on an innocent criminal defendant.⁶⁹

It was perhaps due to their effort to nip reformist ideas of Wycliffe’s kind in the bud that the sixteenth century neo-Thomists strengthened the Azonian argument underlying Aquinas’ viewpoints. As has been shown in two classical contributions on the subject, the distinction between the public power of the judge and his private knowledge was reinforced at the beginning of the sixteenth century by Tomasso da Vio Cajetanus (1468–1534), an Italian Dominican and the first great commentator of Thomas Aquinas.⁷⁰ Cajetan insisted that the judge ought to decide not according to his free will but according to the statutes and the laws (*leges et iura*), since as a public person, his is obliged to proceed in accordance with public knowledge, which depends on the witnesses. This argument continued to play a central role in the writings of Francisco de Vitoria and Domingo de Soto. Typically, at the outset of the seventeenth century Puritans such as William Ames (1576–1633) would counter-argue that it was not legitimate to split up the judge into a public person and a private person.⁷¹

It is worthwhile having a closer look at Domingo de Soto as one example among many 16th century Catholic advocates of the Thomistic standpoint – the ‘legalist opinion’ as Delanglade tellingly coins it.⁷² Importantly, Soto distin-

⁶⁶ Nörr, *Zur Stellung des Richters*, p. 76.

⁶⁷ Padoa-Schioppa, *Sur la conscience du juge*, p. 116.

⁶⁸ Whitman, *The Origins of Reasonable Doubt*, p. 168.

⁶⁹ Whitman, *The Origins of Reasonable Doubt*, p. 169–71.

⁷⁰ Radin, *The Conscience of the Court*, p. 509–511; Delanglade, Jacques: *Le juge, serviteur de la loi ou gardien de la justice selon la tradition théologique*, in: *Revue de droit canonique*, 10, 1960, p. 141–64, especially p. 154, and 11, 1961, p. 3–31, especially p. 4.

⁷¹ Whitman, *The Origins of Reasonable Doubt*, p. 168–9.

⁷² Delanglade, *Le juge*, p. 5–6. See, for instance, Soto’s way of putting the question in *De iustitia et iure*, p. 155r (bk. 5 q. 4 art. 2): ‘*Utrum iudici liceat contra veritatem quam certo novit iudicare, quando legitime probatur contrarium?*’ (stress is ours). Turrini, *La coscienza del giudice*, p. 289, n. 28, opines that Delanglade’s vocabulary is slightly anachronistic.

guishes between two forms of discrepancy between the judge's private knowledge and the legitimate evidence: (1) either the judge knows for sure that the criminal defendant is innocent despite the evidence to the contrary, or (2) the evidence is in favor of the criminal defendant while the judge personally knows that he is in fact guilty. In Soto's view, Thomas Aquinas merely dealt with the first case, since the solution of the second case poses no problems. Secret crimes, viz. crimes that are not brought to light according to the legitimate rules of trial procedure, cannot be prosecuted.⁷³ Since the private knowledge of the judge does not constitute sufficient witness (X. 1, 31, 2), the criminal defendant must be acquitted if he cannot be convicted by following the rules of trial procedure.⁷⁴ In this case, the 'legalist opinion' clearly favors the position of the criminal defendant.

However, the Thomists' refusal to acquit an innocent criminal defendant despite the judge's private knowledge to the contrary is another logical conclusion of their rigorous legalism. Soto's argumentation, which spells out Thomas' in more detail, is compelling in this respect.⁷⁵ He sets out by stating the principle that nobody can have the right to condemn anyone by virtue of his private authority. Public authority is required to judge and judgment in turn requires knowledge of the law and the facts. Since judgment relies on public power, this knowledge must necessarily be of a public nature (*scientia publica iuris et facti*). Hence, the laws themselves and not subjective assessment of the law must be attended in determining the legal issues at stake in the trial. By the same token, the judge must follow public testimony and not his own observations to establish the facts of the case. Moreover, Soto argues, since the judge is not allowed to condemn the criminal defendant on the basis of his private knowledge, it would be inconsistent to maintain that he can acquit the criminal defendant by virtue of his private knowledge.

So the Thomists' consistent application of a kind of legality principle *avant la lettre* was clearly not in favor of the criminal defendant when the judge knew for certain that he was innocent, but the legitimate outcome of the trial was different. In that case, the innocent criminal defendant had to be convicted,

⁷³ It may be worthwhile noticing here that according to the laws, notably Gratian's *Decretum* (C.2 q.1 c.2), a person cannot be sentenced to death unless his guilt has been legitimately proven through his own confession or by several witnesses.

⁷⁴ Soto, *De iustitia et iure*, p. 155v (bk. 5 q. 4 art. 2 par. *Duplex quaestionis sensus*).

⁷⁵ Soto, *De iustitia et iure*, p. 156r (bk. 5 q. 4 art. 2 par. *Prima ratio*): '*Nemo ius habet quempiam condemnandi auctoritate privata, sed in quantum publica fungitur. Ad iudicium autem requiritur et scientia iuris et facti. Ergo et utraque debet uti publica, non privata, nempe ut sicut in scientia iuris non debet sequi suam opinionem, licet reputet esse scientiam, sed auscultare debet leges, ita neque in cognitione facti sequi potest privatam suam scientiam, sed stare tenetur testium publicae fidei quam leges probant. Secundo arguitur. Per suam scientiam iudex neminem condemnare potest, ut supra dictum est, quantumlibet eum evidenter noverit esse reum, ergo neque potest quempiam absolvere.*'

even though the judge was admonished to try by all legal means to refute the false witnesses.⁷⁶ It should be recalled that this solution was put forward by the moral theologians for the sake of the judge's conscience, although it might strike a modern audience, as it struck the Reformers, as being unconscionable. Yet concerns about judging in the past were not entirely coincident with ours.⁷⁷ Originally, the rules of procedure were also an attempt to shift the burden of moral responsibility away from the judge. Hence the paradox that for the sake of conscience, the evidence must be followed, not 'conscience'. Soto forcefully endorsed that legalistic idea. Importantly, he did so not only for the sake of the judge's conscience, but mostly for the sake of the stability of the political order:⁷⁸

Public trials have been constituted for the sake of the tranquility and the peaceful state of the republic, and in this manner that there is no way left open for the judge to turn away from the truth wherever he would fancy to do so. Now if he were not bound to judge according to the evidence presented, the peace of the republic would be disturbed immediately.

In other words, 'reason of state' (*tranquillitas et quietus status reipublicae*) excuses the occasional conviction of innocent people through the strict application of the legitimate rules of procedure, which have been laid down to avoid judicial arbitrariness. To explain why the peace of the public order would be disturbed if the judge could arbitrarily base his decisions on private knowledge, Soto makes two very realistic observations.⁷⁹ To begin with, justice could always be declined by a judge who pretends to know that the truth is opposite to the evidence. This is a common sense argument which can be traced back as far as Azo.⁸⁰ More importantly, therefore, is that Soto goes on to note that, since the

⁷⁶ Soto even suggested that the judge may help the criminal defendant to escape prison if he is absolutely sure about his innocence and can do so without causing public scandal; cf. *Soto*, *De iustitia et iure*, p. 155v (bk. 5 q. 4 art. 2 par. *Caietanus*).

⁷⁷ *Whitman*, *The Origins of Reasonable Doubt*, p. 1–7.

⁷⁸ *Soto*, *De iustitia et iure*, p. 156r (bk. 5 q. 4 art. 2 par. *Tertia ratio*): '*Tertio arguitur ex fine publicae auctoritatis. Publica iudicia ob tranquillitatem et quietum statum reipublicae constituta sunt, atque eo pacto ut nulla sit patula iudici via declinandi, ubi vis libuerit, a veritate. Si autem non teneretur secundum allegata iudicare, pax ilico reipublicae turbaretur. Nam cum populus de occultis non iudicet, videns non stari publicis probationibus, non posset non in iudicem proclamare, tunc praesertim cum de re atroci lis esset, ut de urbis prodicione, aliave simili. Praeterea, iudici semper relinqueretur via excusandi se ab executione iustitiae, per hoc quod diceret sibi patere contrariam veritatem. In summa necessarium est ut iudex qui in oculis civium ius dicit sententiam suam populo persuadeat, eatenus saltem, ut vincatur secundum iura fuisse prolata, quod facere nequiret nisi secundum allegata iudicaret.*'

⁷⁹ *Soto*, *De iustitia et iure*, p. 156r (bk. 5 q. 4 art. 2 par. *Tertia ratio*): see previous footnote.

⁸⁰ *Padoa-Schioppa*, *Sur la conscience du juge*, p. 107.

people do not judge what is hidden – that is the judge’s private knowledge – they would inevitably cry out against the judge if they saw that the judge did not stand by the public proofs. Put differently, the scope of Soto’s argument is that for the sake of public order, justice must not only be done, but also be seen to be done:⁸¹

In sum, it is necessary that the judge, who renders justice before the eyes of the citizens, persuades the people with his sentence, so that the people are convinced that the sentence was rendered according to the law. He could not possibly do that unless he judged according to the evidence presented.

Soto’s argument sounds quite modern. The stability of public order, particularly the judicial system, is based on the people’s faith in justice served. To this end, justice must be seen to be done. That is why the legitimate rules of the trial should never be abandoned, no matter how far the evidence deviates from the judge’s ‘conscience’.

IV. Putting the protection of the innocent criminal defendant centre-stage

In the preceding paragraphs we have seen Thomistic moral theology emphasizing the need for objective legal standards to prevail over the judge’s *arbitrium* in convicting or acquitting a criminal defendant. They were staunch defenders of the maxim that judges ought to decide according to the evidence and not according to ‘conscience’. Insisting on the public character of the office of the judge, they regarded a blind adherence to legitimate evidence as the safest path both for the judge’s conscience – from a moral point of view, and for the maintenance of order and peace – from a political point of view. The fact that the criminal defendant benefitted from this doctrine in the event that his guilt could not be legitimately proved even though the judge knew better, seems to have been but an incidental corollary of it. After all, in the event he was found guilty according to the evidence, while the judge knew for certain that he was in fact innocent, the emphasis on legality meant that he could not be acquitted.

The harshness of the ‘legalist opinion’ – which used to be popular among the theologians but with which the jurists often found themselves uncomfortable⁸² – appears to have been tempered in the theological tradition by Leonardus Lessius. With Lessius, at the outset of the seventeenth century, the emphasis comes to lie increasingly on the protection of the criminal defendant. For one thing, Lessius strengthened the protection of the criminal defendant that was

⁸¹ Soto, *De iustitia et iure*, p. 156r (bk. 5 q. 4 art. 2 par. *Tertia ratio*).

⁸² See *Radin*, *The Conscience of the Court*.

inherent in Thomas' consideration that the judge's private knowledge of the defendant's guilt is irrelevant.⁸³ This has been noted before by Judit Bellér.⁸⁴ Further explanation of why this reinforcement was needed, follows in the next paragraph. For another thing, Lessius tried to modify the application of the 'legalist opinion' to the case of the criminal defendant who was proven guilty by the witnesses regardless of the fact that the judge privately knew that he was truly innocent.⁸⁵ Lessius has been credited by Delanglade with being the major promoter of this moderate, defendant-friendly view, allegedly shaping the mainstream Catholic moral theological view on the criminal trial for centuries to come.⁸⁶

As to the first problem, a debate had raged among the jurists and the theologians whether a distinction needed to be made in this case between inferior judges, superior judges and the prince. The thirteenth century Orléans jurist Jacques de Révigny restricted the application of the maxim *Iudex secundum allegata et non secundum conscientiam iudicare debet* to inferior judges.⁸⁷ It was thought to be within the power of the prince and the superior judges to decide on the basis of their private knowledge, since they were not bound by positive human law. Superior judges and the prince were thought to possess a considerable amount of *arbitrium* for which they were only accountable in conscience. Thus, according to Antonio Padoa-Schioppa, Révigny spelled out a principle – further developed by Pierre de Belleperche (d. 1308), Cynus of Pistoia (1270–1336/7) and Bartolus a Saxoferrato (1313–1357) amongst other jurists – that was to underlie the enormous discretionary power of some of the most important courts across Europe, ranging from the Court of Chancery in England to the Senate of Milan.⁸⁸

Lessius explicitly denied superior judges and the prince the right to convict the criminal defendant on the basis of their private knowledge in spite of the evidence to the contrary. He rejected the argument that superior judges and the

⁸³ Lessius, *De iustitia et iure*, p. 344–5 (bk. 2 ch. 29 dub. 11: *Utrum iudex possit aliquid ex privata scientia, aut certe non citatum et auditum, condemnare*).

⁸⁴ Bellér, Judit: *De insontibus non condemnandis*. Conflitti di coscienza del giudice nella giurisprudenza tardo-medievale, in: *Materiali per una storia della cultura giuridica*, 21, 1991, 293–306, especially p. 295–6.

⁸⁵ Lessius, *De iustitia et iure*, p. 341–4 (bk. 2 ch. 29 dub. 10: *Utrum iudex possit condemnare reum qui per testes legitime est probatus criminis, v.g. homicida, quem tamen certo novit innocentem*).

⁸⁶ Delanglade, *Le juge*, p. 157.

⁸⁷ Padoa-Schioppa, *Sur la conscience du juge*, p. 113–4.

⁸⁸ Excellent analysis of the extended discretionary powers of the judges in these superior courts can be found in the respective contributions by *van Caenegem*, Raoul C.: *Le rôle de la conscience du juge dans l'histoire du droit anglais*, in: *Carbasse / Depambour-Tarride: La conscience du juge*, p. 263–76, especially p. 263–70, and *Cavanna*, *La conscience du juge*, especially p. 238–40.

prince were granted exemption from the two fundamental rules of due process.⁸⁹ He was also critical of the canonist Diego de Covarruvias y Leyva's (1512–1577) claim that the private knowledge of the prince fulfills the requirement of two or more witnesses.⁹⁰ Yet, more importantly, Lessius argued that the rule that the judge ought to decide according to the evidence and not according to his 'conscience' had been laid down as a matter of the law of nations (*ius gentium*).⁹¹ Interestingly, Lessius went on to argue that this principle of *ius gentium* is part of the conditions upon which the people have transferred their power to the prince. Consequently, the prince and the superior judge cannot subvert this procedural rule on pain of violating the political contract and committing tyranny.

Lessius' rebuttal of the contrary opinion is interesting because it illustrates the growing awareness that the criminal defendant has a 'constitutional' right to due process and that this is the reverse side of the limits to political and judicial power. This evolution is not without its antecedents in the *ius commune*.⁹² If the defendant's rights to be heard and to be cited are not respected by the prince, the defendant is denied the natural right and the weapons to defend himself.⁹³ However, true to the nuanced 'logic of the ordinary and the extraordinary', Lessius also recognized that there was a limited set of exceptional cases in which the prince could convict a criminal on the basis of his private knowledge alone.⁹⁴ These cases include fierce rebellion – provided that private talks have first taken place, and huge security threats – provided that they cannot be averted by any other means. Particularly, if the prince has the support of three other witnesses, he can proceed to kill the criminal secretly, at least if a public trial would be seriously inconvenient.⁹⁵

⁸⁹ He identified these rules with the defendant's right to be heard and his right to be considered innocent until proven guilty by two or more witnesses. Cf. *Lessius*, De iustitia et iure, p. 344 (bk. 2 ch. 29 dub. 11 num. 92).

⁹⁰ *Lessius*, De iustitia et iure, p. 345 (bk. 2 ch. 29 dub. 11 num. 95–98).

⁹¹ *Lessius*, De iustitia et iure, p. 345 (bk. 2 ch. 29 dub. 11 num. 94): '*Quarto, ut sententia feratur ex publicis probationibus, non est mere iuris positivi in quo princeps possit dispensare, sed est iuris gentium et sub cuius onere et obligatione respublica censetur suam potestatem in principem transtulisse, ita ut si princeps non observet, iam manifeste videatur declinare in tyrannidem.*'

⁹² For example, the idea that the defendant's right to due process is absolute can be found in its fully-fledged form already back in the work of the French canonist Jean Le Moine, see *Pennington*, Due process, p. 34–7.

⁹³ *Lessius*, De iustitia et iure, p. 345 (bk. 2 ch. 29 dub. 11 num. 99): '*Dico quarto, princeps quantumvis sit certus de crimine, non potest ordinarie condemnare, nisi citatum et auditum. Est communis doctorum. Ratio est, quia contra facere, esset auferre arma reo, quibus se iure potest defendere, negando crimen, si est occultum, vel certe excusando eo modo, quo poterit; unde iure gentium hoc receptum est, imo videtur esse iuris naturalis.*'

⁹⁴ *Lessius*, De iustitia et iure, p. 345 (bk. 2 ch. 29 dub. 11 num. 100–1).

As to the second problem, Lessius tried to forge a compromise between the 'legalist opinion' of Thomas Aquinas and his followers, on the one hand, and the idea, defended by Nicolaus of Lyra (c. 1270–1349), Johannes Calderinus (d. 1348) and Abbas Panormitanus (1386–1445) amongst others, that the judge should never convict an innocent criminal defendant – called the 'anti-legalist' opinion' by Delanglade.⁹⁶ The basis for that intermediary position had been laid by Adrian of Utrecht (1459–1523), the first and last Pope from the Low Countries who had taught moral theology in Leuven a couple of generations before Lessius.⁹⁷ A distinction was made between civil cases and minor criminal cases, on the one hand, and capital cases, on the other. The 'legalist opinion' could not be accepted in criminal cases where the life of the defendant was at stake. Lessius recognized that it was morally safe to follow the Thomistic view that an innocent man has to be convicted on account of evidence to the contrary, since the argument that public knowledge is the criterion for deciding in a public office holds water perfectly.⁹⁸ Yet he believed that the 'anti-legalist' opinion was nearer to the truth, simply because an innocent man should not be sentenced to death.

The main reason why Lessius defended this intermediary position is of a moral rather than of a strictly juridical nature. He considered the killing of an innocent man to be intrinsically evil (*intrinsece malum*).⁹⁹ He compared it to sleeping with somebody else's wife. Even if all evidence is to the contrary, but you know that this is actually not your wife, you have to abstain from having intercourse with her, otherwise you commit sin. Similarly, taking somebody's life without the necessary authority is intrinsically evil. Since the life of an innocent man lies in the power of God only, a judge deciding to convict him commits an intrinsic evil. Of course, the judge can sometimes be granted the

⁹⁵ In writing this piece of historical research in the spring of 2011, the author cannot help but wonder how Lessius would have assessed the rights of certain 'criminals' in the contemporaneous Arab and Asian world.

⁹⁶ For an extensive overview of the civilians, canonists and theologians who endorsed these respective viewpoints, see *Delanglade*, *Le juge*, p. 145–51, and *Bellér*, *Di insontibus non condemnandis*, p. 297–8.

⁹⁷ *Delanglade*, *Le juge*, p. 155. The author also notes on p. 151–3 that Adrian of Utrecht's view may in turn have benefited from ideas in Baldus, Pietro de Ancharano and Giovanni d'Imola which fitted neither of the two major opposing views.

⁹⁸ *Lessius*, *De iustitia et iure*, p. 341 (bk. 2 ch. 29 dub. 10 num. 77).

⁹⁹ *Lessius*, *De iustitia et iure*, p. 341 (bk. 2 ch. 29 dub. 10 num. 78). '*Quod autem sit intrinsece malum, probatur. Primo, quia per se malum est adimere alicui vitam sine auctoritate; atqui iudex nullam habet auctoritatem in vitam innocentis, cum haec soli Deo sit subiecta. Ergo iudicem eam adimere per se malum est. Secundo, si iudex habet hanc auctoritatem condemnandi innocentem, id ei concessum est propter bonum reipublicae, atqui ob nullum reipublicae bonum, etsi in proximo periculo versetur, licet directe innocentem occidere, ut ostensum est supra cap. 9, dub. 7. Ergo multo minus licebit ob hoc periculum remotum et cui alia ratione potest obviari.*'

authority to pronounce a capital punishment for the sake of the good of society. Yet there is no political good, even if the State were in immediate danger, which justifies killing an innocent man directly. Since, at least in this case, upholding the procedural order and the public good is tantamount to the killing of an innocent man, the outcome of the legitimate trial should not be followed.¹⁰⁰

With his ‘anti-legalist opinion’ in capital cases, Lessius expressly attacked the Thomistic standpoint which saw the occasional killing of an innocent man as some kind of unfortunate, collateral damage justified by the higher end of maintaining public order at all costs (*conservatio boni publici*), and, hence, the procedural rules on which this order rested (*conservatio ordinis iudiciarii*).¹⁰¹ However, Lessius claimed that the natural reason behind the maxim that judges ought to decide on the basis of public evidence was actually not because it constituted the best safeguard against public disorder, but because, on balance, it was the best guarantee for finding justice and truth (*veritas et iustitia*).¹⁰² So if this procedural order would evidently lead to a false outcome, it could not be followed, just as a law which frustrated the intention for which it had been laid down must not be followed. The moral foundations of the pre-modern legal order come clearly to the fore here.

The ‘anti-legalist’ views of Lessius were probably not only motivated by his moral non-negotiables, but also by the particular historical context in which he lived. It may be recalled that the Low Countries were particularly touched by the religious wars between Reformers and Counter-Reformers from the second half of the sixteenth century onward. This context of tension between rivaling religious groups may have played a decisive role in Lessius’ suspicion of strict legalism in capital cases. This is obvious from the following argument. Calumniators succeed in falsely accusing an entire monastery with a capital crime, such as treason, idolatry or sodomy.¹⁰³ Nobody would dare to say, according to Lessius, that those monks must suffer punishment by burning at the stake or

¹⁰⁰ Lessius, *De iustitia et iure*, p.342 (bk. 2 ch. 29 dub. 10 num. 79): ‘*Servare iudiciorum ordinem et bonum publicum in hoc casu non est quid distinctum ab occisione huius hominis.*’

¹⁰¹ Lessius, *De iustitia et iure*, p. 342 (bk. 2 ch. 29 dub. 10 num. 79).

¹⁰² Lessius, *De iustitia et iure*, p. 342 (bk. 2 ch. 29 dub. 10 num. 80): ‘*Tertio probatur, quia ratio naturalis ideo dictat iudicem debere sequi notitiam publicam per allegata et probata acceptam, ne facile aberret aut discedat a veritate et iustitia in iudicando. Haec enim est ratio illius legis et obligationis. Ergo quando ei est omnino evidens iudicium fore iniustum si sequatur probata et allegata, non debet nec potest ex illis iudicare. Nulla enim lex servari debet, quando ex eius observatione sequeretur id, quod est intentioni et fini legis contrarium.*’

¹⁰³ Lessius, *De iustitia et iure*, p.342 (bk. 2 ch. 29 dub. 10 num. 81): ‘*Quinto, fieri potest ut multorum conspiratione integrum monasterium accusetur et testibus convincatur de prodicione reipublicae, de idolatria, de sodomia et similibus gravissimis criminibus, et iudex certo sciat illorum innocentiam. Quis non horreat dicere, illum tunc posse et teneri*

quartering, if the judge knew that those monks were innocent. The conclusion is that the judge should rather lay down his office, or even be murdered by the people himself, than commit the intrinsic evil of sentencing the innocent monks to death.¹⁰⁴

Importantly, Lessius would not allow of deviations from the outcome of the legitimate procedural order but in the case of innocent people falsely accused with capital crimes. He insisted that the Thomistic standpoint remained true in civil cases and minor criminal trials. While the life of an innocent man could only be disposed of by God except under exceptional circumstances, his goods could always be subject to decisions by a judge for the sake of the public good.¹⁰⁵ In Lessius's view, the maintenance of public order through the strict observation of the evidence constituted a just title for the judge to decide that the defendant must be deprived of his goods, even though he privately knew that the defendant was innocent or in his right. Part of why Lessius could defend this opinion, is that in the worldview of the scholastic moral theologians, this was not the end of the story. Since the defendant suffered this sanction despite the fact that he was innocent or without fault, he could take the law in his own hands.¹⁰⁶ In fact, he could secretly recuperate his goods, since he had never truly lost ownership.¹⁰⁷

*viros innocentissimos equis discernere vel flammis tradere ob calumnias et minas perditorum?*²

¹⁰⁴ Lessius, *De iustitia et iure*, p. 342 (bk. 2 ch. 29 dub. 10 num. 82): *'Ex his sequitur primo, iudicem non posse innocentem illum condemnare ad mortem, etiamsi officium suum deberet amittere, immo etiamsi ipse alioquin occidendus a populo foret, quia est intrinsece malum.'*

¹⁰⁵ Lessius, *De iustitia et iure*, p. 343 (bk. 2 ch. 29 dub. 10 num. 84): *'Probatur primo, quia respublica habet auctoritatem disponendi de fortunis suorum civium, easque de uno in alium transferendi, prout bono publico expediens fuerit, ut patet ex legibus usucapionum. Atqui hic videtur esse iusta causa, tum ne forma publicorum iudiciorum cum populi scandalo pervertatur, tum quia non suppetit ratio, incommodum huius hominis avertendi. Ergo potest statuere, ut iudex in tali casu formam publicam iudiciorum sequatur, etiamsi inde fiat, ut fortunis eum spoliare debeat, quem privatim innocentem vel bonam causam habere novit.'*

¹⁰⁶ On this peculiar form of *Selbsthilfe*, which was known as secret compensation (*occulta compensatio*), see Decock, Wim: Secret Compensation. A Friendly and Lawful Alternative to Lipsius's Political Thought, in: De Bom, Erik et al. (eds.), (Un)masking the Realities of Power. Justus Lipsius and the Dynamics of Political Writing in Early Modern Europe, Leiden, 2011, p. 263–80, especially p. 266–280. It was frequently promoted by the scholastic moral theologians as a way of vindicating natural rights which had been violated or ignored by the court system. This ultimate remedy to assure the maintenance of Justice and Truth is not understandable, of course, except in the context of a pre-modern society in which the State has not yet conquered the monopoly over norms and the dispensation of justice.

¹⁰⁷ Lessius, *De iustitia et iure*, p. 343 (bk. 2 ch. 29 dub. 10 num. 84): *'Tertio, quia haec bona possunt recuperari, nec ita per sententiam illis privatur ut eorum dominium amittat, ut recte docet Aragon (...) et Sotus (...) et alii doctores. Non enim ea est mens reipublicae, nec esse iuste potest, cum sententia falsis probationibus nititur. Id enim esset*

All in all, Lessius devised a nuanced jurisprudential solution to the remaining challenge of finding a balance between the concern for legality and public order, on the one hand, and the truth, on the other. Perhaps that explains why his position seems to have gained common ground among theologians in subsequent centuries.¹⁰⁸ In any event, his intermediary position in between the ‘legalist opinion’ and the ‘non-legalist opinion’ resulted in maximal protection for the criminal defendant. A conflict between the evidence and the judge’s private knowledge was almost always resolved to his advantage.¹⁰⁹ If the evidence was in favor of him, although the judge knew for certain that he was actually guilty, the criminal defendant was granted acquittal. In capital cases, the judge’s private knowledge was exceptionally allowed to overturn the legitimate outcome of the trial so that the life of the innocent criminal defendant could be spared.

V. Conclusion

We live in a world shaped by secularism, the separation of religion from the realm of public life. We live in a juridical world defining itself along the lines of legal positivism, the denial of norms not created by the legitimate institutions. We live in a society in which ‘progress’ and the making of a ‘better’ legal system is almost spontaneously equated with secularization and positivism. As a result, we have an innate tendency to read the story of the development ‘from *arbitrium* to the legality principle’ as parts of a dream come true. Indeed, the drafters of the French criminal code envisioned a Beccarian future in which the people would be convicted or acquitted merely on account of their own will as expressed in the laws. The arbitrary judge would be reduced to loud-speaker, learned jurists to automats, legislators elevated to the status of semi-Gods. Yet we now live in a world where dreams lie scattered. Over the last decades, the sacred legality principle has reportedly been more of a bogeyman than a dream come true.¹¹⁰

absque necessitate calumniatoribus favere. Itaque potest ea occultis modis recuperare ab eo cui sunt adiudicata.

¹⁰⁸ Delanglade, *Le juge*, p. 157; Bellér, *De insontibus non condemnandis*, p. 305–6.

¹⁰⁹ A precursor to Lessius who comes close to having formulated this balanced, defendant-friendly doctrine might perhaps be found in the late 12th century canonist Huguccio of Pisa; see Padoa-Schioppa, *Sur la conscience du juge*, p. 103. There is no evidence that Lessius was familiar with Huguccio’s views on the topic.

¹¹⁰ See, for instance, the critical observations on the current state of criminal justice in Durand, Bernard: *Arbitraire du juge et consuetudo delinquendi. La doctrine pénale en Europe du XVIe au XVIIIe siècle*, in: *Publications de la Société d’histoire du droit et des institutions des anciens pays de droit écrit*, V, Montpellier, 1993, p. 213, and Monballyu, *Zes eeuwen strafrecht*, p. 63 and p. 68–9.

This paper has not been an attempt to revive the dream of the legality principle, nor did it include a plea for returning to the alleged nightmare (which specialists argue was not that frightening after all) that preceded it. What it has purported to show is that dreams and nightmares are likely to distort our view of the past. If the real concern behind the legality principle is the protection of the criminal defendant against arbitrariness, then it is legitimate to ask ourselves the question whether safeguards other than the modern legality principle may have existed in the past which, directly or indirectly, constituted alternative ways of dealing with the same, remaining issue. Bolstered by recent studies revealing the theological origins of fundamental conceptions of the criminal law as well as by Meccarelli's admonishment that the pejorative account of *arbitrium* is as much the product of the Enlightenment imagination as the consequence of a dire reality, we have sought to give a glimpse of the moral theologians' solutions to the problem described.

Guiding the souls of judges serving in deeply Christian societies, the paradoxical advice offered by Thomas Aquinas was that judges had to convict innocent criminal defendants despite their 'conscience' to the contrary for the sake of their conscience. There is no room for discretion here, much emphasis on following the outcome of the legitimate procedural order, and, clearly, little protection for the innocent criminal defendant. In the early sixteenth century, Cajetan even reinforced the view that statutes and laws always prevail over the judge's free *arbitrium*. Soto followed this line of reasoning. In case of discrepancy between the legitimate evidence and the judge's private knowledge, he forcefully advised judges to stick to the evidence as a matter of conscience. He buttressed it through public policy arguments that sound remarkably modern: for the sake of the maintenance of public order, justice must not only be done but also be seen to be done. Hence, the evidence can never be deviated from. If the judge relied on his *arbitrium* instead of the legitimate proofs, people would lose confidence in the judicial system.

The criminal defendant could definitely benefit, too, from this 'legalist opinion' as defended by the Thomists, yet this would have been an indirect consequence of the legalist principle as much as conviction was the indirect consequence of heeding the proofs. If a judge had to acquit him because of lack of legitimate proof despite his private knowledge to the contrary, then this rigid system turned to his advantage. However, it is clear that the rights of the innocent criminal defendant could not be protected under these assumptions. Although Soto admonished the judge to help the innocent man escape prison, at least if this could be done without creating scandal, he was adamant that the judge should convict him on account of the proofs in the first place. If Lessius, at last, advocated the view that the legitimate proofs against an innocent criminal defendant should give way to the judge's *arbitrium* in capital cases, he did so on the grounds of moral reasons. Too much legalism, Lessius argued, would

turn the judge into the upholder of intrinsic evil. In this case, *arbitrium* was the best instrument to protect the interests of the criminal defendant. The problem of the innocent defendant thus turned out to be a test case both for the Thomist conception of the importance of maintaining legitimate procedural order and the moral mechanisms that could protect the criminal defendant.