

COMMENTARY ON
THOMAS AQUINAS'S
TREATISE
ON LAW

J. BUDZISZEWSKI

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Treatise on Law

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Commentary on Thomas Aquinas's *Treatise on Law*

Natural moral law stands at the center of Western ethics and jurisprudence and plays a leading role in interreligious dialogue. Although the greatest source of the classical natural law tradition is Thomas Aquinas's *Treatise on Law*, the *Treatise* is notoriously difficult, especially for non-specialists. J. Budziszewski has made this formidable work luminous. This book – the first classically styled, line-by-line commentary on the *Treatise* in centuries – reaches out to philosophers, theologians, social scientists, students, and general readers alike. Budziszewski shows how the *Treatise* facilitates a dialogue between author and reader. Explaining and expanding upon the text in light of modern philosophical developments, he expounds this work of the great thinker not by diminishing his reasoning, but by amplifying it.

J. Budziszewski is a Professor of Government and Philosophy at the University of Texas, Austin. He also teaches courses in the religious studies department and in the law school, and he maintains a personal scholarly website, www.undergroundthomist.org. Dr. Budziszewski has published widely in both scholarly journals and magazines of broader readership. His books include *The Resurrection of Nature: Political Theory and the Human Character* (1986); *The Nearest Coast of Darkness: A Vindication of the Politics of Virtues* (1988); *True Tolerance: Liberalism and the Necessity of Judgment* (1992); *Written on the Heart: The Case for Natural Law* (1997), winner of a *Christianity Today* book award in 1998; *The Revenge of Conscience: Politics and the Fall of Man* (1999); *What We Can't Not Know: A Guide* (2003); *Evangelicals in the Public Square: Four Formative Voices* (2006); *Natural Law for Lawyers* (2006); *The Line Through the Heart: Natural Law as Fact, Theory, and Sign of Contradiction* (2009); and *On the Meaning of Sex* (2012).

*To the Angelic Doctor
though unworthily*

Analytical Table of Contents

Questions 90–97 are included here in full. Since this is an analytical table of contents, I have superimposed an outline format to show more clearly the place of each section in the whole. Sometimes St. Thomas phrases his section titles differently in his prologues than before the sections themselves; for clarity here, I have sometimes combined them. The various brief “Before Reading” sections are my own, distinct from the sections of commentary devoted to St. Thomas’s various Prologues. Although the *Commentary* is self-contained, the *Companion to the Commentary*, an online book available via the Resources link at the *Commentary*’s catalogue webpage (<http://UndergroundThomist.org>), provides both additional commentary on brief selections from Questions 98–108 and additional discussion of various themes in each Prologue and Article, for readers who want to understand the *Treatise* in still greater depth. Topics covered in the *Companion* are listed immediately after this analytical table of contents.

Acknowledgments

Although, like a hermit, I withdrew into a little cave to write this commentary, the effort has seemed almost communal, for my cleft in the rock has been filled with a dense cloud of friends, teachers, models, mentors, and ancestors, without whose encouragement, example, learning, and occasional chastisement, none of the work could have come to pass. From time to time one of them is mentioned in the footnotes. The others, including my gracious external reviewers, know who they are.

As I was working, the questions my students have asked over the years have tinkled and hummed continually in my ears, prodding me on. I am grateful for all of them, not only for those which they raised in perplexity, wonder, or delight, but also those which they blurted in dismay and consternation, for not only is Thomas Aquinas difficult, deep, and luminous, but he probes with needle-sharp instruments.

For material support for this project, I thankfully acknowledge my debt to the Earhart Foundation and the University of Texas at Austin.

Without my wife Sandra, fresh fountain of cool water, this work would have been utterly unthinkable.

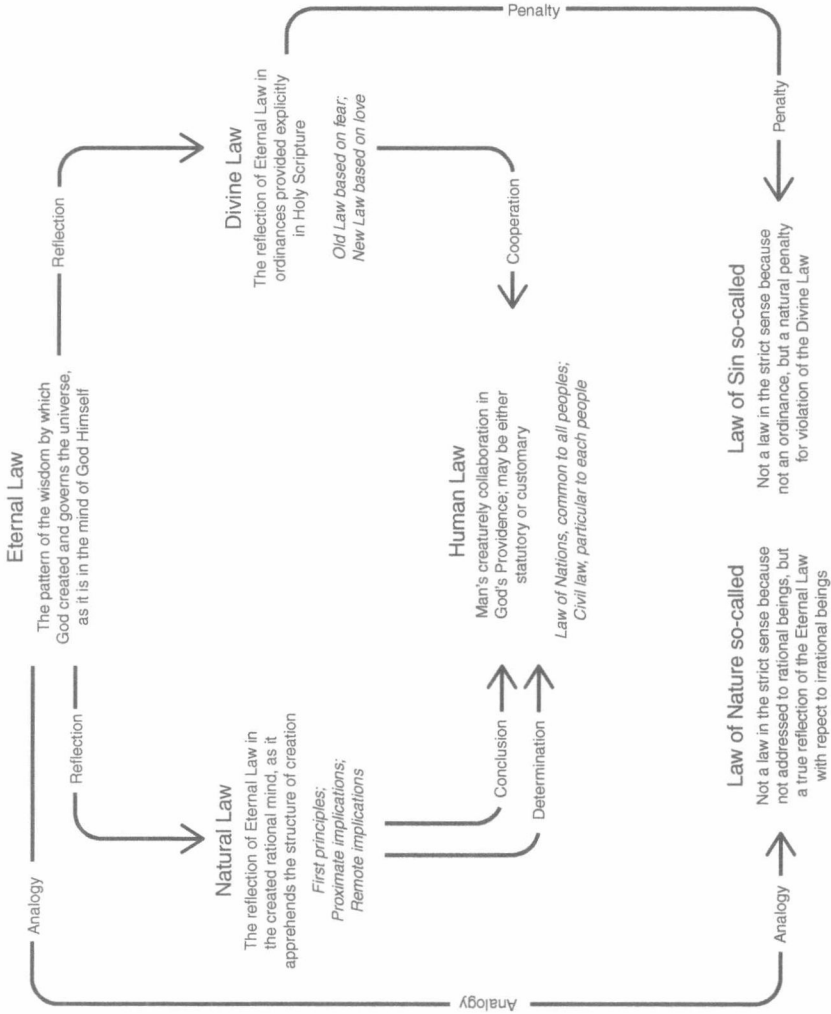
Ante Studium
(Before Study)

Ineffable Creator, Who out of the treasures of Your wisdom appointed treble hierarchies of Angels and set them in admirable order high above the heavens; Who disposed the diverse portions of the universe in such elegant array; Who are the true Fountain of Light and Wisdom, and the all-exceeding Source: Be pleased to cast a beam of Your radiance upon the darkness of my mind, and dispel from me the double darkness of sin and ignorance in which I have been born.

You Who make eloquent the tongues of little children, instruct my tongue and pour upon my lips the grace of Your benediction. Grant me penetration to understand, capacity to retain, method and ease in learning, subtlety in interpretation, and copious grace of expression.

Order the beginning, direct the progress, and perfect the conclusion of my work, You Who are true God and Man, Who live and reign forever and ever. Amen.

Thomas Aquinas



THE ARCHITECTURE OF LAW

Introduction

Who Is Thomas Aquinas?

By consent of learned opinion, St. Thomas of Aquino, “the Angelic Doctor,” is one of the greatest philosophers and theologians of all time. A good many of those who know his work would say that the qualifying phrase “one of” gives him too little credit. Every cranny of reality is illuminated by his reflections, and his address is universal. Persuaded that Sacred Scripture and Apostolic Tradition are true and reasonable, he writes as a Christian, yet not a few atheists consult his writings assiduously; his works are too penetrating for anyone safely to ignore. For all these reasons, what we call Thomism is not just a dusty episode in the history of ideas, or a set of formulae written down in a book, but a living, unfolding tradition that continues to develop. As he challenges his critics, so he invites challenge in turn, asking for correction at any point where he turns out to be in error.

How mortifying it is to the contemporary intellect that so few in our day can read the work of this great mind. How surprising, for despite terrific resistance, our time is witnessing a modest renaissance of several of the themes about which he wrote so acutely, especially natural law. And how intolerable, for there is no need for such a doleful state of affairs to persist. The purpose of this book, a commentary on just one of St. Thomas’s works, the *Treatise on Law* – itself but a part of his magnum opus, the *Summa Theologiae* – is to contribute in some small way to its amendment.

Born into an aristocratic family in 1225, St. Thomas died only forty-nine years later. He received his early education at the hands

of Benedictine monks, and his parents expected him to become a Benedictine abbot. While still a boy, he was sent to the University of Naples, where he first came into contact with the Dominicans, an explosively popular mendicant preaching order, and received his first exposure to Aristotle, as well as to the philosopher's Jewish and Muslim commentators. In his late teens, he committed himself to become a Dominican friar. Anticipating that his family would interfere, the Dominicans sent the young man to Rome, planning that he would then go to Paris. En route, he was kidnapped by his brothers and returned to the family. For two years the family kept him behind locked doors, in hopes that he would lay down his vocation. At one point his brothers even tried to tempt him by sending a prostitute into his room; resisting the temptation, he drove her away and prayed for lifelong continence, a gift that was granted to him. Since all efforts to dissuade him from his vocation were unsuccessful, the family saved face by permitting him to escape, and he was lowered from his window in a basket to waiting Dominicans. Shortly thereafter he professed vows. He studied first in Paris, then under Albertus Magnus in Cologne. During his Cologne years he was ordained priest, and he later received his doctorate in theology from the University of Paris, where he had already become known for his writings and lectures on philosophy, theology, and Scripture. Traveling widely to teach and to preach, he produced a massive oeuvre of more than sixty major and minor works. These include three major theological summations (the *Summa Theologiae*, the *Summa Contra Gentiles*, and the *Commentary on the Sentences of Peter Lombard*); commentaries on various philosophers and books of the Bible; various other works on philosophical and theological topics; and a number of prayers, hymns, sermons, and popular works, for example the *Explanation of the Ten Commandments*.

Legends about St. Thomas abound. From the age of five, his teachers remarked that he was a boy of unusual piety who persistently asked, "What is God?" Often as he prayed, and more frequently toward the end of his life, he was in a state of contemplative ecstasy. Three of his Dominican brothers recorded that on one occasion, after he had completed a work on the Sacrament of the Eucharist and was praying before the altar, they heard a voice from the crucifix saying, "You have written well of me, Thomas. What would you have as reward?" St. Thomas replied, "Only you, Lord."

After another experience in prayer, St. Thomas suspended dictation to his friend, colleague, and confessor, Reginald of Piperno. When Reginald

begged him to resume his work, St. Thomas replied that he could not do so, because such things had been revealed to him that everything he had written seemed straw by comparison. Not long afterward he received papal summons to attend the Second Council of Lyon, convened because of concern about the division of the Eastern and Western Church. On the way, he suffered an accident and collapsed. Taken to a nearby Cistercian monastery, he died, while composing, at the request of the monks, a commentary on the *Song of Songs*.

What Is Law?

Law is often viewed as a narrow and specialized topic, having to do only with the ordering of human society, and with only certain aspects of its ordering at that – especially control. Of course there is such a thing as human society, and it really is ordered by law. But to tear this order from its broader context is to make it unintelligible, because human law cannot pull itself up by its own efforts. It hangs like a chandelier from something higher.

In the view of St. Thomas, law is no less than the pattern for God's governance of everything he has made. This is not its *definition*; we will come to that in its proper place. But it is a true statement about what law does. Law begins in God's providential care for the universe, the pattern of which is eternal law. Man's finite participation in this providential care is human law. Linking the eternal and human orders are the two different reflections of eternal law that we humans can glimpse, one in the created intellect itself, the other in revelation. These two reflections are natural and Divine law, respectively. Created things that lie beneath us, like dogs and mushrooms, cannot catch these reflections. In one sense they too are under law, for God governs them no less than he governs us. But in a stricter sense they are not under law, because for them the mode of government is different. It has to be: They cannot recognize governance. There is no image of law in their minds, as there is in ours. Either, like the mushrooms, they do not have minds, or else, like the dogs, they do not have the sorts of minds that can participate in law. Of course dogs come much closer than mushrooms, for dogs recognize commands – sometimes even quite complex instructions. Yet not even the dog recognizes the command as *law*. He obeys for the sake of praise, or a treat, or the feeling of belonging to the group – not because he reflects that the command is an ordinance of reason, or that it serves the common good. This privilege belongs to us as *rational* creatures, and makes it true to say that although

in one sense law is about the entire created universe, in another sense it pertains especially to man.

As St. Thomas conceives it, then, the topic of law, the topic of the *Treatise*, is immense. It should interest students and scholars in many different disciplines, as well as thinking people of all sorts. Astonishingly, St. Thomas manages to cover it in just nineteen sections.

How Does the Treatise on Law Fit into the Summa?

The title, *Treatise on Law*, is ours, not St. Thomas's. Though it is too late to do anything about it, in one way the term "treatise" is unfortunate, because it gives the impression of a free-standing and self-contained work. Though the *Treatise* is often read in that way, it was never meant to be. All of the limbs of the *Summa Theologiae* are interconnected, and the *Treatise on Law* is no exception.

The *Summa Theologiae* is divided into three main parts. Death interrupted St. Thomas's work before he could complete the Third Part, so an extra part, the Supplement, collects material on topics that he had intended to address. This additional material comes from one of his previous works, the *Commentary on the Sentences of Peter Lombard*. It was probably assembled by Reginald of Piperno, the friend mentioned previously.

Summa means "summation," and the *Summa Theologiae* is a summation of what can be known about God, man, and the relation between them. Each of the *Summa*'s main parts is organized into the topical sections we call treatises. The First Part inquires into God and his Creation, including the nature of man in general; the Second Part, into man more particularly; and the Third Part, into the work of Jesus Christ, as a mediator between man and God. The great movement of the whole work is from God, the creator, to man, God's creature, back to God, man's final end. Along the way we consider the things that may help or impede the return of man to God.

In turn, the Second Part is divided into the First Part of the Second Part, which considers morality in its broad principles, and the Second Part of the Second Part, which considers morality in more detail. These more detailed matters include the three theological virtues and four cardinal virtues, which pertain to everyone. They also include various acts that pertain not to everyone but only to some persons, because of the diversities of gifts and of states and ways of life, especially in the Church. Certain acts, for example, are incumbent upon priests but not lay people.

St. Thomas places the *Treatise on Law* in the First Part of the Second Part. He puts it *after* his treatises on man's ultimate purpose or end, on human acts in general, on passions, on "habits" or dispositions (which include virtues), and on vice and sin. All these things are preambles to law, and we will refer to them often. Equally important, however, is the fact that St. Thomas places the *Treatise on Law* before, not after, the *Treatise on Grace*. Just as law is not the first word about man, so it is not the last; justice is married to mercy. As the Psalmist declares, "Mercy and truth have met each other: justice and peace have kissed."¹

For Whom Is this Commentary Written?

I am a scholar, and I mean this commentary to be worthy of the attention and use of scholars in a number of fields, especially law and jurisprudence, philosophy and theology of ethics, and philosophy and theology of politics. However, I am resolute that it should also be accessible to students, general readers, and other serious amateurs, and in this introduction they receive my first attention. Among a certain sort of scholar, one sometimes meets the prejudice that readable prose is a kind of slumming. The idea is that if ordinary people can grasp the meaning of what someone has written, then surely it can have nothing to offer to minds as erudite as theirs. St. Thomas himself would reprobate this attitude. Though his greatest work continues to challenge the most learned minds, he says on its opening page that he purposes to write "in such a way as may tend to the instruction of beginners."

St. Thomas explains that too often in other books, beginners are hampered by the multiplication of useless material, by repetition so frequent that it produces weariness and confusion, and by the fact that necessary topics are taught in the wrong order – not according to the nature of the subject, but according to the plan of the author's book or the opportunities it offers for digression. "Endeavoring to avoid these and other like faults," he says, he will try, by God's help, to present his explanations "as briefly and clearly as the matter itself may allow." This goal I have taken as my own, though a line-by-line commentary is inevitably longer than the work that it seeks to explicate.

My point about "beginners" should not be stretched too far. St. Thomas is not speaking of persons with no prior exposure to the doctrines he

¹ Psalm 84:11 (DRA), corresponding to Psalm 85:10 in more recent translations of the Bible. See the remark about translations at the end of this Introduction.

presents, but of students who have studied their philosophical preambles and are ready to move on to theology proper. Today, a good many of what he considers preambles are unfamiliar even to most philosophers. That is one of the reasons why a commentary is necessary. But the remedy is straightforward enough. As he goes along, the commentator must explain the preambles too.

A book of this sort can never move swiftly, but to keep it as brisk as may be, I omit much of the clutter that is rightly expected in specialist journals but not needed here. I cannot purge all the footnotes, but I keep them to an absolute minimum, mostly to give the sources of quotations. Digressions about how Professor X responded to what Professor Y said about Professor Z are cast into oblivion. For those who consider familiarity with such wrangles the very purpose of scholarship, I can only say that I disagree. Not that I don't have views about these debates. Those who are already familiar with them will no doubt try to guess the positions I would take. They may occasionally guess right. Yet the purpose of this book is not to discuss the discussions about what St. Thomas wrote, much less to discuss *those* discussions, but just to discuss what he wrote.

What Kind of Book Is the Treatise?

The literary genre in which the Treatise on Law is composed is the formal disputation – a form that contemporary readers tend to find chilly. Some of our feeling of chilliness arises from its structure; some from our ignorance of the reasons for this structure; and some from the fact the objections to which St. Thomas replies are not necessarily the ones we would have asked. Once these problems are addressed, most of the chill is dissipated.

How a Disputation Is Structured

A formal disputation is an extremely concise way of presenting and analyzing the state of a question that is under consideration. It puts all of the competing views in the clearest possible confrontation, so that one can pull up one's sleeves and solve the problem.

A disputation resembles a debate with a built-in review of the literature. The same format is always followed: First is the *ultrum*, the “whether,” always in the form of a yes-or-no question, usually one to which the traditional answer is “Yes.” In second place are the principal *objections* to a “Yes” answer, set forth in a list. These might also be called the difficulties. Third comes the *sed contra*, the “on the contrary” or “on the other hand,”

a statement of the traditional view. Fourth, the *respondeo*, or “I answer that,” also called the *solutio*, or solution, expressing the author’s own view. Finally the author makes use of the solution to reply to the objections, resolving each difficulty in turn.

The importance of the *ultrum* is often overlooked. In every field of learning, so much depends on asking the right question and framing it fittingly. If the wrong question is asked, the answer may be misleading; if the right question is asked, but framed in an unfittingly manner, one may never find the answer at all. So much time is needlessly lost, and so much ardor wasted, by failing to get the question right. Good teachers used to put their students through exercises in framing questions fittingly. Some still do. St. Thomas is a master of framing questions.

It may seem odd that St. Thomas states the objections before stating the view to which they object. But isn’t that true to life? Aren’t we all tempted to tell what is wrong with a proposition before we fully understand it? St. Thomas begins where people are already, even if they are confused. Only then does he present his own analysis, which he then uses to unravel whatever confusions he has found. If an objection is correct in some respect, he says so. If it is mistaken, he tells how. For purposes of a commentary like this one, it might be tempting to reorder each article so that the *respondeo* comes first and the objections afterward, each one followed by its reply. Many people do read them that way. Unfortunately, this is like skipping to the end of a mystery novel to find out whodunnit, then going back to the beginning; it misses the point. The objections are of the sort called naïve. Suppose the question on the table is “Whether Q.” The objections aren’t the kinds of things that might be said against St. Thomas’s arguments for Q, by people who found these arguments wanting; they are the sorts of things that might be said against Q itself, by people who haven’t yet grappled with his arguments.

Why St. Thomas Uses the Disputational Structure

St. Thomas has enormous respect for the authority of those who have thought about the questions before him. However, the authorities he consults are in disarray. One who believes that something is to be gained by consulting authority must first harmonize all the conflicting authorities – and that involves something more than just repeating what the authorities say.

The problem of conflicting authorities is endemic to all fields, but especially, perhaps, to law. In the sixth century A.D., the Byzantine Emperor

Justinian commissioned what we now call the *Corpus Juris Civilis*² in order to harmonize a sprawling mass of legal material that had accumulated over a period of a thousand years, including case law, enacted law, senatorial consults, judicial interpretations, and imperial decrees. Written under the supervision of Tribonius, the *Corpus* includes four parts: The *Codes*, a collection of imperial “constitutions” or legislation dating from the time of the Emperor Hadrian; the *Institutes*, a manual for students of law; the *Digest*, or *Pandects*, a collection of excerpts from Ulpian, Gaius, and thirty-seven other great Roman jurists; and the *Novels*, added later, a collection of “new” legislation. Ultimately, the *Corpus Juris Civilis* becomes one, but only one, of St. Thomas’s sources.

As we approach St. Thomas’s time, we find a similar legal disarray in Europe. The muddle is even worse, because not only have laws and precedents continued to multiply, but now they come from multiple sources, for imperial authority has declined, a variety of local authorities have interposed, and civil law is now paralleled by canon law. A century before St. Thomas wrote, the great thinker Gratian had undertaken a synthesis of canon law, harmonizing discordant materials including Scripture and Scriptural commentaries, the writings of the Fathers, the decisions of various Church councils and synods, and the letters and decretals of various popes.³ Gratian adopted and developed a set of powerful tools for disentangling snarls, especially what is called *distinctio*, or distinction.

To illustrate how *distinctio* works, suppose veterinary science had fallen into disorder. A great deal of knowledge has been preserved, but in great confusion. One problem is that the great veterinarians of ancient times make a number of apparently conflicting statements about so-called dogs. A dog is a mammal, says one. A dog is a creature that barks, says another. A dog is a kind of wolf, says a third. A fourth says that men are dogs, or perhaps only that many men are dogs, although some hold that she was not actually a veterinarian but a controversialist in something called the war between the sexes. A fifth remarks merely that dogs are highly variable. Taking sides among these authorities, competing schools of thought have developed. Mammalists hold that all mammals are dogs, so cows are dogs. Barkists maintain that anything that barks

² *Corpus Juris Civilis*, meaning “body of civil law,” is actually a modern name for the work, dating only to the sixteenth century.

³ For discussion, see the Introduction, by Katherine Christensen, to Gratian, *The Treatise on Laws [Concordance of Discordant Canons]*, trans. Augustine Thompson, *With the Ordinary Gloss*, trans. James Gordley (Washington, D.C.: Catholic University Press, 1993), p. 3.