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DePaul Law Review

Volume 1
Issue 2 *Spring-Summer 1952*

Article 22

Aquinas: Summa Theologica, The Treatise on Law, Questions 90-97 inclusive

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Recommended Citation

Dr. Brendan F. Brown, *Aquinas: Summa Theologica, The Treatise on Law, Questions 90-97 inclusive*, 1 DePaul L. Rev. 312 (1952)
Available at: https://via.library.depaul.edu/law-review/vol1/iss2/22

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REVIEWS

On the next few pages, the DE PAUL LAW REVIEW *presents what it believes to be a new and stimulating approach to law review book sections. Customarily, this space is devoted to comment on new works only. It was felt, however, that lawyers and students would benefit from a re-examination of outstanding legal treatises —writings which had already made an imprint on the law and become classics. This thought seemed entirely in keeping with the tradition of the law which, more than any other art, analyzes the past so that the present and future may be more readily understood. To inaugurate this series, Dean Brendan Brown of the School of Law, Catholic University of America, reviews the "Treatise on Law" contained in "The Summa Theologica" of St. Thomas Aquinas.*

Summa Theologica, The Treatise on Law, Questions 90–97 inclusive. By ST. THOMAS AQUINAS.

This celebrated treatise by the greatest philosopher-theologian of all times has contributed an imperishable insight and wisdom to the solution of the perennial problems related to the essence of law, its kinds, causes and effects and the obligation of man to obey it. Although it was written in the thirteenth century for the immediate purpose of ending the confusion which existed at that time, its universal and eternal validity and applicability have been attested by its present vitality and by the tremendous influence which it has exerted in the field of law and jurisprudence during the past seven centuries. St. Thomas has taken the wisdom found in Greek philosophy, in the Bible, in the contributions of St. Augustine, Isidore of Seville, and the Pandects of Justinian, for example, and transformed it by his own genius which perceived new relationships and distinctions. This brilliant synthesis constituted the first fully elaborated, systematic, scholastic explanation of the concept of law, enjoying universal acceptance throughout Christendom until the sixteenth century which initiated a new epoch, characterized by the detachment of human law from both Divine Positive Law and natural law, and from the metaphysical order of moral right and wrong.

St. Thomas begins his discussion of law in Question 90, by considering its essence. He defines law as an ordinance of reason for the common good, made by him who has care of a community and promulgated. It is a rule and measure that pertains to the practical reason which is concerned with the direction of actions. It relates to particular matters, only insofar as they refer to the common good in the sense of common end. It must be made by the proper authority, and communicated in some adequate manner to those to whom the law is applicable.

In Question 91, Thomas Aquinas describes the various kinds of law. The eternal law is the Supreme Reason of God, governing the whole universe. The natural law is that part of the eternal law which applies to rational creatures. Human law is that made by human reason in implementing the natural law in regard to variable factual situations. Divine Positive Law is that given directly to man by God, directing him to his supernatural end, which is not

proportionate to his merely natural faculties. The animal-inclination law is a sort of law which inclines man toward sensuality, resulting from original sin, as a penalty imposed by Divine Justice.

In Question 92, he explains the various effects of law. Every law-maker must intend to make men good, by commanding what is good, forbidding what is evil, permitting what is morally indifferent, and punishing the offender in order to insure obedience to the law. Law makes citizens good by leading them to their proper virtue (i.e.), by insuring their obedience to the sovereign, who is justly seeking to effectuate the common good. It is not enough, therefore, for law merely to advise men. It is necessary for it to command acts of virtue (i.e.), behavior which is generically good. It is imperative that law forbid acts of vice, namely, those which are generically evil. It should permit all acts which are generically indifferent, for it is not concerned with them. Punishment, which is the effect, not the cause, of law, is justifiable to compel obedience, when it is necessary.

In Questions 93-95 inclusive, Thomas Aquinas goes into detail concerning eternal law, natural law and human law. Thus in Question 93, he states that the eternal law is the highest reason existing in God. It is the Divine Wisdom, directing all actions and movements in creation toward their proper objectives. Since it is a plan in reference to activity rather than being, it pertains to God as Governor of the Universe, rather than as Creator or Artificer.

This eternal law is known to all, but in different senses. Only those who will enjoy the Beatific Vision in the hereafter can know this law in itself, or directly. But all rational creatures are more or less cognizant of the eternal law through perception of its effects (i.e.), indirectly according to their capacities.

Every law is derived from the eternal law. It is the master-plan for the government of the universe. Rational creatures are competent to do no more than to implement this plan by sub-plans, reasonably determined in regard to variable, temporal facts and conditions. Even the law of animal-inclination is derived from the eternal law in the sense that it is punishment arising from Divine Justice. Unjust law is actually a mismoner, for it has the nature of violence rather than of law. But insofar as an unjust law has the form and appearance of law, it, too, is derived from the eternal law, since all civil authority comes from God ultimately.

But the eternal law has its limitations. The activity of all that has been created by God falls within its scope, but not activity pertaining to the Divine Essence, which is the eternal law itself. God's Will, which is His Essence, therefore, is subject neither to Divine Government, nor the eternal law.

Not only are rational creatures subject to the eternal law, but also non-rational creatures, which participate in the Divine Reason by obeying it. God moves them as the First Cause, despite their limitations. Man cannot impose law on non-rational beings, although they are otherwise subject to him. Man can make law only for those human beings who are subject to the civil authority in question.

All human beings are obliged to obey the eternal law. In no man does the inclination toward sensuality so dominate that it destroys the whole good of his nature. Hence there is in every man the inclination to act in conformity with the eternal law, despite sin. Both the good and the wicked are bound to obey this law. Rational creatures participate in this law by knowledge and natural inclination, but non-rational creatures only by an inward motive principle.

Men are naturally adapted to be the recipients of virtue. But sin obscures

the natural knowledge of good and destroys, to a certain extent, the natural inclination to virtue. Hence the wicked are subject to the eternal law only imperfectly.

In Question 94, the Angelic Doctor begins his discussion of the natural law in detail. He maintained that this law is a habit only in a certain sense (i.e.), insofar as its precepts, by which we act, are sometimes in the reason only habitually. But essentially, the natural law is not a habit, but rather a set of objective principles, valid despite the fact that they cannot be followed, in certain instances, as in the case of infants, who have not yet attained the age of reason.

The first principles in the spheres of both the speculative and practical reason are self-evident in themselves and cannot be demonstrated. The first principle of the speculative reason is that a proposition may not be affirmed and denied at the same time and in the same sense. This involves being and not being. The first principle of the practical reason, which is concerned with doing or not doing, is to do good and avoid evil. All the precepts of the natural law flow from this principle which is a recognition of the notion of good, which all creatures seek. Although all the precepts which are derivable from this principle by reason are several, this does not mean that there are several natural laws.

Each man's reason naturally dictates to him to act virtuously. In this sense, all acts of virtue are prescribed by the natural law. But if virtuous acts are considered in themselves, as the result of experience, for example, they are not all dictated by the natural law.

Now the general principles of the natural law are applicable to all men and known by all. But since reason may fail in exceptional situations, it follows that error may be made in regard to the conclusions which are deduced from these general principles. The possibility of error increases the more these conclusions relate to detailed factual patterns. This is the explanation, for example, why the ancient Germans, as described by Julius Caesar, did not regard theft as morally wrong.

The first principles of the natural law may never be changed, nor may they ever be abolished from the heart or mind of man. But reason may be hindered from properly applying these principles to particular sets of fact. Evil may blot out those precepts of the natural law which are not self evident.

In Question 95, Thomas Aquinas considers human law with regard to its utility, origin, nature and classification. Human law must be enacted in order to deter the wrong-doer and protect the innocent. It has pedagogical value for it habituates those who are inclined to evil to act virtuously through force and fear.

Besides, justice according to positive law is preferable to that which would be meted out by judges uncontrolled by such law because just statutes may be enacted well in advance of litigation after careful and mature deliberation apart from the emotion engendered by present, concrete circumstances. These statutes are generally conducive to justice because they are directed to typical, abstract, future events. But these statutes cannot provide for every possible case. Hence judges must have discretion to adjudicate certain cases.

Although all human law is derived in some way from the natural law, nevertheless various legal systems exist among different peoples. This results from the great diversity of conditions among them. Variations of method are bound to exist, therefore, as to the precise application of the natural law.

Human law may be derived from natural law in one of two ways (i.e.), either as a conclusion from premises, or as a determination of a generality. Thus "do not kill" is a conclusion of the principle, "do not harm another," or a statute may provide a particular penalty to be imposed on an evil doer, who should be punished according to natural law. In the first instance, the conclusion is more intimately bound up with the natural law, than is the determination in the second case.

Thomas Aquinas approves the description of positive law as given by Isidore of Seville, namely,

> Law shall be virtuous, just, possible to nature, according to the custom of the country, suitable to place and time, necessary, useful; clearly expressed, lest by its obscurity it lead to misunderstanding; framed for no private benefit, but for the common good of the people.

In brief, human positive law is a rule and measure of man's conduct, but it is in turn ruled and measured by the natural law and the Divine Positive Law. Its utility consists in its promotion of the common good.

He also agrees with Isidore's division of human law. It may be divided into international and national, or municipal, civil law; into military and ecclesiastical law; into constitutional law and law named after its author in regard to the matter covered. Thus international law, though its conclusions are not very remote from the natural law, is not entirely identical with it. Conformity to these conclusions is necessary for man, a social animal. But each state is free to derive its civil law by way of particular determination from the natural law, in its own unique way.

Another criterion of classification of human law may be found in the division of men according to the manner in which they serve the common good, such as priests, princes, and soldiers. The structure of the particular state, which may be a monarchy, aristocracy, oligarchy, or democracy, provides still another basis of division of positive law. Here the source of the human laws in question determines whether they should be called Royal Ordinances, Responsa Prudentium, Senatus Consulta, Praetorian or Honorary Law, Plebiscita, and the like. Again, the classification may appropriately depend upon the subject matter covered by the law, which may be named after its author.

In Question 96, St. Thomas analyzes the power of human law. He argues that such law must be enacted for the benefit of the community, not of any individual as such. It must be general, for it would be useless if it did not extend beyond one single act. As long as law is applicable in a majority of instances, it is sufficiently certain. Strictly speaking, decrees are not laws. They are only applications of general laws to particular cases. But they are legal and have the force of law.

Human law should not be expected to repress all vicious acts, by obliging precepts, anymore than it is under a necessity to prescribe all virtuous acts. It is beyond the province of human law to prohibit all acts which are forbidden by the natural law. But it must suppress those more grievous vices from what it is possible for a majority of the people to abstain. These must be suppressed if society is to survive. But most members of the community whom the law is intended to bind are by no means perfect in the matter of virtue.

Human law is not obliged to prescribe every act of virtue. But it must command those virtues which are necessary for the common good, either im-

mediately or mediately. Every law-maker should encourage, however, acts of virtue for their own sake (i.e.), so that the acts will not only be virtuous, but also proceed from virtue.

Human law binds in conscience, if it is just, for it is enacted in consequence of an authority which the law-maker obtains from God. A just law will not only be for the common good, but it will be within the scope of the authority of the law-giver, and will distribute burdens fairly among the people. While unjust law is not binding, in conscience, nevertheless, prudence may dictate obedience to the law to avoid public disturbance. St. Thomas implied that this law took away a person's right to do the thing forbidden, but did not oblige him to do something intrinsically wrong.

All men are subject to just human law, although it does not coerce the just as it does the wicked. The will of good men is in harmony with such law; the will of the wicked is in opposition. The sovereign is above positive law, for no one is competent to judge him. But the sovereign is under God and the natural law. Nor is the sovereign exempt from the directive force of just positive law. In this connection, he is subject to the judgment of God. It is his duty to fulfill the law on his own free initiative.

Even though a person is subject to a law, he may, under certain circumstances, act beyond its letter, not so as to pass judgment on the law, but only to the extent that a particular case does not justly come within the meaning of the law. An exception may be presumed to have been intended by the law-maker, who cannot anticipate every possible future case to which the law should apply. But if there is time, a formal dispensation should be requested from the proper authorities. Nor may a person presume an exception to the law if he is in doubt.

In Question 97, Thomas Aquinas discusses the matter of change in laws. He agrees with St. Augustine that human law, though just, may justly be changed in the course of time. A particular law may not always be adapted to the common good. Legal institutions are at first rudimentary and imperfect and may be improved.

But since law derives great force from custom in regard to observance, it should never be changed lightly. Hence, when a change in the law is contemplated, the advantage to the common good must outweigh the detriment resulting from diminution of the binding power of the legal order. In this respect, laws differ from rules of art.

Custom may obtain the force of human law, as well as interpret and abrogate it. But it may not abolish the primary principles of the natural law or Divine Positive Law. Custom derives its power from the fact that the authority of the people to make law is greater than that of the sovereign, who represents them. It expresses the legislative will of the people. Force is lent to the custom insofar as the law-maker tolerates it. Custom reflects the deliberate judgment of many reasonable men, if it is just.

Finally the rulers of the people may dispense from human law, if by so doing, they benefit the common good. If a precept is not for the common good, when applied to a certain person, or to a particular set of circumstances, then the law-giver may decide that the law is not applicable. It is not a matter of respect for the persons involved, therefore, when special treatment is accorded.

In the thirteenth century, St. Thomas clarified the ambiguity of Greek philosophy concerning the natural law. He brought to maturity the tradition of that law in the field of Jurisprudence. The analytical tradition was carried

on by the Glossators. The schools of Natural Law Jurisprudence and Analytical Jurisprudence competed in that century, just as they did ever since the origin of the science of law, as understood by the Roman jurists who had utilized Greek thought. Implicit in his exposition of Natural Law Jurisprudence were the premises requisite for the growth and development of that type of legal thinking which took into consideration the constantly changing social and economic situations of the human community.

Greek philosophers had interpreted the phenomena of nature around them so as to conclude that in human society, just as in all creation, there must be an ordering or maintenance-principle, insuring regularity and rhythm, in order that chaos might be avoided. This principle had universal, transcendental validity all over the world, by way of analogy for example to the truth that fire burned in the same manner, irrespective of time or place. There was a certain identity of law among the Greek city states, as well as diversity. The identity was explained by the conclusion that it demonstrated conformity to the universal principles of reason, right, and justice, whereas the diversity was due to variation of local conditions. Part of positive law was man-made by political authority and force. But another portion rested on a moral law which was discovered.

But neither Greek philosophers nor Roman jurists had a perfected concept of natural law. The latter came to a knowledge of *jus naturale* (i.e.), the ideal element implemented by the *jus gentium*, or body of positive law made up of the common denominators of the legal systems of those peoples with whom the Romans had commercial and cultural contact, but they did not agree as to whether it came from a pantheistic nature, or from a Personal Lawgiver. It was not clear whether the *jus naturale* was a law of instinct, which deprived man of freedom of moral choice; or whether it was a law to which man ought to conform, but to which he might refuse obedience in consequence of his peculiar and unique faculties. Even the *Corpus Juris Civilis* of Justinian (Digest I, 1, 3), written as late as the sixth century A.D., included Ulpian's rather ambiguous definition of *jus naturale*, namely, that which nature taught all animals.

It remained for Thomas Aquinas to explain the full doctrine of natural law, by Christianizing the Stoic concept of it. For him, the *jus naturale* became *lex naturalis*. This indicated that it was the enactment of a Law-maker, with Will and Reason, differing from Divine Positive Law in the matter of its scope and promulgation. He distinguished between its relation to man and that of the eternal law to animals and inanimate creation.

There was no intrinsic conflict between the development of the natural law juristic tradition, as elaborated by St. Thomas and his successors, and the simultaneous, paralleling growth of the analytical aspect of legal science, resulting from the work of the Glossators and commentators. But these two juristic traditions became antithetic as soon as the doctrine of the morally supreme and uninhibited state became dominant in practice during the post-reformational period. Today, only the vigorous maintenance of the notion of law, which was advocated by St. Thomas Aquinas, and its proper implementation, can prevent political and social catastrophe.

In conclusion, there is implicit in the work of Thomas Aquinas those premises which justify that law produced since his time, as a result of the awareness by legislators of the existence of society as an entity. This awareness gave new insight into the social impact of certain acts of great injustice, now identified as crimes, in both the national and international spheres, and particular

acts of lesser injustice, principally in the economic sphere, now recognized as offenses against social justice. But the sociological implications of law foreshadowed by his treatise, while identifying in a certain way each member of the society in question with the victim of certain types of injustice, made the rights of society derivatives of the rights of individuals in their social relationships, rather than inherent powers exercised by an amoral entity.

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Prisoners at the Bar. By FRANCIS X. BUSCH. Indianapolis: The Bobbs-Merrill Co., Inc., 1952. Pp. v, 288.

Guilty or Not Guilty. By FRANCIS X. BUSCH. Indianapolis: The Bobbs-Merrill Co., Inc., 1952. Pp. v, 287.

This reviewer would confess that he approached *Prisoners at the Bar* and *Guilty or Not Guilty* with a measure of suspicion that here were but two more volumes concerning admittedly important criminal trials which might prove to be but literary husks. Perhaps the known ability and experience of the author should have compelled a more hopeful attitude but, alas, the legal reader in this field is too familiar with publishers' offerings, too optimistically heralded, which are but drab recitals of crimes, awkwardly supplemented by the inevitable and too often random excerpting from trial transcripts.

Happily, Mr. Busch does not conform to this tired pattern and for each trial furnishes the reader with a preliminary statement describing the crime involved, followed by a genuinely fascinating narrative of the trial proceedings and a concise statement of the trial's aftermath.

The crimes described in these two volumes represent a nearly exhaustive catalogue of the American criminal causes célèbres of the past forty years.

In *Prisoners at the Bar* will be found accounts of the trials of William Haywood and George Pettibone for the murder of Gov. Steuenberg of Idaho; of Sacco and Vanzetti for murders which were obscured by the international reaction to their trials and executions; of Loeb and Leopold for the senseless and brutal slaying of a Chicago boy and of the drama that was Darrow's effort in their behalf; and of the phlegmatic Bruno Hauptmann for the kidnapping murder of the son of Colonel Lindbergh.

Guilty or Not Guilty describes the crimes concerned and trials of D. C. Stephenson, the one-time Grand Dragon of the then evilly powerful Ku Klux Klan, which trial involved a highly interesting problem of homicidal causation; of Samuel Insull on a charge of colossal mail fraud and of the controversial Alger Hiss for perjury. This volume, in what is perhaps its most interesting trial account, tells also of the nearly forgotten Leo Frank, who was convicted in Georgia of the murder of a 13 year old girl under a cloud of alleged anti-Semitism and who, when his death sentence was commuted to life imprisonment in an atmosphere of national tension, was wrested from the penitentiary by a mob and murdered.

In the author's accounts of these trial proceedings can be clearly discerned the sure hand of the perceptive trial advocate of experience. His characterization of cross examination as having been telling or inept, his observation that a prosecutor concluded his case, as he should, with a strong witness, his conclusion that certain testimony though vigorously attacked was apparently con-

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