

ARTICLE

Misunderstanding Aquinas on Law

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Abstract

This article investigates how two eminent scholars, the French cultural historian Rémi Brague and the American professor of Government J. Budziszewski misunderstand Aquinas on law. It explores the possible reasons for their misunderstandings. In both cases there is a failure to appreciate the theological context and content of what St Thomas has to say about law. Their lack of appreciation for the theological content explains also their individual specific distortions of the account of law. Brague confuses eternal law and divine law, which Aquinas explicitly distinguishes, and applies an abstract notion of the divine which heapplies not only to medieval Christian texts, but also to Greek, Egyptian, Jewish, and Islamic ideas on law. Budziszewski imposes on St Thomas's classification of types of law the logical structure of genus and species, despite acknowledging that Aquinas avoids this language. The result is that he fails to appreciate the significance of eternal law. Both scholars misapprehend eternal law, and this is due to their ignoring theology. They exemplify a characteristic mistake of treating St Thomas as a philosopher, and his theology as something added on to the philosophical account.

Keywords: Aquinas; Brague; Budziszewski; law; Theology; Eternal law; Divine law

There are good reasons for the eminent position granted St Thomas Aquinas in the intellectual life of the Catholic Church. The reasons for his exalted position are many. His medieval achievement of integrating Augustinian theology with Aristotelian philosophy has become a model for the challenge facing Catholic theologians in every place and every age: how the faith of the Church can dialogue with culture.

Pope Leo XIII in August 1879 issued an encyclical letter *Aeterni patris* in which he established Aquinas as the preferred philosopher for the Church. This adoption as the 'court philosopher' had many consequences, both good and bad. The good outcome was a greater accessibility to his texts and a wide dissemination of familiarity with his thought. The bad effects included a simplification and distortion of his thought because of the need to produce textbooks and summaries to be used in the teaching of seminarians. The associated movement known as Neo-Thomism became a target for twentieth-century philosophers and theologians reacting against the confinement of Catholic intellectual life within its bounds. The reaction led in due course to a desire

to recover the thought of Aquinas and to allow it a hearing on its own terms, not as the required ideology of the Church. What resulted was a wave of scholarship recovering the works of the Dominican friar.

The scholarship was fruitful and led to a revived engagement with Aquinas. However, not all of the new scholarship was reliable, and several misunderstandings have arisen. My purpose in this article is to expose some misunderstandings of St Thomas on the topic of law. That readers of Aquinas fail to grasp the import of what he writes is not surprising. His style of writing and explaining can be clear and lucid so that the meaning of his text appears evident. Acceptance of the *prima facie* meaning can be deceptive, however, because it may lack awareness of the context or of the background literature. Seemingly relevant to modern concerns, the words of Aquinas may appear to contribute to twenty- and twenty-first-century debates and are taken as such. This danger arises most acutely in the interpretation of Aquinas on topics of secular interest, such as the philosophy of law, and political philosophy.

The principal danger is to read Aquinas solely as a philosopher, and not primarily as a theologian. Associated with this danger is the tendency to regard theological content as something added on to the philosophy, with the assumption that the philosophy can stand on its own. Aquinas is brought into conversation with other thinkers and philosophers simply as a philosopher, without consideration of the theological context or indeed the theological content of his work.

A related danger is to read his texts as if the meanings of his terms were accessible. Whether read in Latin or in English translation, words are frequently taken as having the meaning that would be given them in a standard dictionary. For instance, the referent of cognate terms such as *lex* (law) and *regula* (rule) may be taken to be the same thing. That laws are rules may seem obvious to many readers of standard English, who may then be surprised to discover that the identification is not so simple. *Regula* can mean a standard or measure as in the sense of a measuring tape.

Another danger is associated with the presupposition of univocity, assuming the meaning of terms as used by Aquinas is constant. This would result in distortion in cases in which the use of terms is analogical, with meanings shifting from context to context, not arbitrarily, but according to some proportion for which a reason can be given.

In this paper, I illustrate these difficulties of interpretation by examining the works of two eminent scholars. The first is a French historian of ideas, Rémi Brague, who was a Professor of Philosophy at the Université Paris I Panthéon-Sorbonne, and the Romano Guardini chair of philosophy (emeritus) at the Ludwig Maximilian University of Munich. Brague's specialisation is in Islamic, Jewish, and Christian thought in the Middle Ages. His 2007 book, *The Law of God: The Philosophical History of an Idea*, discusses Jewish, Christian, and Muslim notions of law from the medieval period. The second author J. Budziszewski is an American, a renowned advocate for Aquinas's understanding of natural law, and author of several works on this topic, including a large commentary on Aquinas's writing on law. He is Professor of Government and Philosophy at the University of Texas, Austin.

I will introduce them and their work more extensively in the relevant sections below. Although they are operating in different disciplines, Brague in the history of ideas, and Budziszewski in the philosophy of law, they serve my purpose for what

they have in common. They engage with the same texts from Aquinas, and they illustrate the difficulties when scholars from disciplines other than theology attempt to read Aquinas through the lens of their own specialisation and with their own guiding interests. A third section will then summarise the argument and draw lessons for the interpretation of Aquinas and the use of his ideas in contexts other than theology.

1. Historian Rémi Brague

I focus on Brague's book on the history of religious thought on law. But this is a narrow focus compared to his other scholarship. He has written on the Greek philosophers Plato and Aristotle, and on the medieval Jewish philosopher Maimonides. Several of his books have been translated into English and published by the University of Chicago Press, including *The Legend of the Middle Ages: Philosophical Explorations of Medieval Christianity, Judaism, and Islam* (2009), and the trilogy on the history of the development of law in the west, *The Wisdom of the World: The Human Experience of the Universe in the Western World* (2003), *The Law of God: The Philosophical History of an Idea* (2007), and *The Kingdom of Man: Genesis and Failure of the Modern Project* (2018). The text from Brague's 2007 book on law of particular interest for my purpose is Chapter 13 on 'The End of the Law: Christianity', coming after chapters on Islamic and Jewish law in a section of the book with the heading 'Divine Law in Medieval Thought'.¹

While my focus is on misunderstandings of Aquinas, it would be unjust to ignore the many ways in which Brague's presentation is correct in appraising St Thomas. He appreciates Thomas's intellectualist approach. Law is not primarily command, but a reasonable directive or proposal. He correctly emphasises that for Aquinas law is a matter of *ratio*, reason, being a reasonable ordering of a community's affairs towards an end. 'Law is a kind of direction or measure for human activity through which a person is led to do something or held back. The word comes from *ligando*, because it is binding on how we should act. Now direction and measure come to human acts from reason, from which, as we have shown, they start.'² In an interesting nuancing of the English term, Brague suggests that law is proposed to persons, placed before them, not imposed on them. The purpose of the law, its end, is their good: a good they attain by their own action.

Where he is less than satisfactory in his representation of Aquinas is on two points: first, he does not sufficiently respect the difference between theology and philosophy, and, second, he cites but does not adopt Aquinas's distinction between eternal and divine law. These two points are linked, since, as I will try to show, it is his failure to appreciate the theological content that leads to his confusion of eternal and divine.

In *Summa Theologiae* 1a2ae question 90, enquiring into the essence of law, Aquinas breaks it down into four aspects, asking whether law pertains to reason, what is the purpose of law, what is the source of law, and the role of promulgation. This discussion

¹Rémi Brague, *The Law of God. The Philosophical History of an Idea*, trans. by Lydia G. Cochrane (Chicago: University of Chicago Press, 2007). The French original *La loi de Dieu: Histoire philosophique d'une alliance* (Paris: Gallimard, 2005). Note that while his actual subtitle in French means 'the philosophical history of an alliance' (between law and the divine), the English translation makes it the 'philosophical history of an idea'.

²St Thomas Aquinas, *Summa Theologiae*, vol. XXVIII, trans. by Thomas Gilby OP (London: Eyre & Spottiswoode, 1966), cited in what follows as *Summa* 1a2ae 90, 1.

builds up a complex understanding of law that Aquinas can compress into a definition of law: 'it is nothing else than an ordinance of reason for the common good, made by [the one] who has care of the community, and promulgated'.³ He explicitly calls this a definition and uses the phrase *nihil aliud est quam*, nothing other than.

Aquinas relates five terms in his account of law: 1. there is a community; 2. it has a common good; 3. there is some body (or somebody) with care for the community (call it the authority); 4. there is law as a reasonable directive; and 5. the law is promulgated, made known to the members of the community.

In discussing the various kinds of law in the following question 91 Aquinas notes that there are four kinds and that for each of these kinds of law, there are the same five terms. This does not generate twenty elements, as we might at first expect, since there is an overlap. The four kinds of law are eternal law, divine law (old and new covenants), natural law, and human law.

Corresponding to eternal law is the whole community of created beings, that is governed by divine providence, divine reason, which orders all things to their end. Aquinas refers to his earlier discussion of creation and divine providence when he considers eternal law, which he does in a question with six articles devoted to this purpose (*Summa* 1a2ae, 93).

Those kinds of law the source of which is God (eternal, natural, and divine) bind in conscience, but what about human law? Aquinas is adamant that if the criteria for just laws are met, then they are binding. Those criteria include the law's purpose, its author, and its form. Unjust laws that are opposed to human good, or to the divine good, are not binding in conscience.

1.1 Brague confuses eternal and divine

These few paragraphs provide a short summary of what Aquinas has to say about law. Brague reproduces Aquinas's distinction between eternal law (in God) and divine (revealed) law when he cites St Thomas's list of the varieties of law (*Summa* 1a2ae, 91). But Brague confuses the categories when he writes that there are two versions of divine law: the eternal law, and revealed law in the old and new covenants.⁴ This is particularly confusing, since for Aquinas indeed there are two instances of divine law, the old and the new, the old law given by Moses and the new law given by Jesus; however, the eternal law is not a version of divine law in Aquinas's sense. Brague's introduction of the term means that 'divine' is given different meanings. In Aquinas, divine law as distinct from eternal law is the revealed law of the Bible. In Brague's use, divine law is a category embracing Aquinas's eternal and divine law. In another context in which Brague presents in summary Aquinas's listing of the four types of law, comparing Aquinas's list to that of St Albert, he misnames 'eternal' as 'divine' so that 'divine' occurs twice in the list.⁵

In many places, even while presenting Aquinas, Brague uses the notion of divine law to refer to what Aquinas would call eternal law. How might one explain such an

³*Summa* 1a2ae, 90, 4: *Et sic ex quatuor praedictis potest colligi definitio legis, quae nihil est aliud quam quaedam rationis ordinatio ad bonum commune, ab eo qui curam communitatis habet, promulgata.*

⁴Brague, *The Law of God*, p. 221.

⁵*Ibid.*, p. 312, n. 69. This was not a translator's mistake. The same mistake is found in the French original, *La loi de Dieu*, p. 544, n. 70.

oversight of the text being studied except by reference to a predominant notion guiding the interpretation such that the referent of divine is already established and the usages of divine and cognate terms in the text are reconstructed in terms of the thesis being upheld? Brague's project as announced in the first chapter is to 'concentrate on the civilizations to which Western Europe is the heir, all of which established a connection between law and divinity'.⁶ Among the questions guiding his project is how to explain the cultural rupture that has occurred from the premodern 'societies in which human behaviour is regulated by laws characterized as "divine"' to the conception of law in modern societies whereby the law 'is quite simply the rule that the human community gives itself'.⁷ Brague's project is clearly placed within the discipline of intellectual history, and the notion of divine that he applies is explicitly distinguished from a theological notion. In methodological comments in the 'Introduction', he notes the distinctiveness of the discipline of theology, which he claims is specific to Christianity.⁸ It would be inappropriate, he claims, to impose on Judaism or Islam, or the religions of the ancient world, a theological project that is alien to them: *fides quaerens intellectum*. By means of a distinction of Greek words he stresses that 'we are speaking of the *divine* (in Greek, *theios*) and not of one or several *gods* (in Greek, *theos*)'.⁹

'Divine' for Brague is then an abstract notion intended to cover Greek, Jewish, and Christian conceptions, and there are passing references also to the Chinese and Egyptian notions of divinity. The term does not imply a reference to a single deity, as he writes: 'The idea of divine law represents a shortcut: divinity applies to the law itself and not to a living person who "makes the law"'. At first sight it seems odd to attribute divinity to an abstraction that seems incapable of putting itself into effect.'¹⁰ Later in the same explanation he writes, 'Greek divine law is divine because it expresses the profound structures of a permanent natural order; Jewish law is divine because it emanates from a god who is master of history. In both cases it is external to the human and transcends the quotidian'.¹¹

Brague's compression of Aquinas's distinction of eternal law and divine law into one category of the divine is conditioned by his formulation of his project of exploring various cultural examples of an alliance between law and the divine. It requires a notion of divine that is abstract and applicable to diverse cultural phenomena. He is quite entitled to develop his own terminology for the purposes of his project in the history of thought. He is also entitled to consider the work of Aquinas in the pursuit of his project. The argument made here is that his use of Aquinas's writings on law involves a misunderstanding and a misrepresentation. In writing of eternal and divine law, St Thomas refers these to their author, intending, in Brague's terms, 'a living person who "makes the law"'. He does not use the label of 'divine' to refer to an abstract notion, but always to the God who is the subject of the questions of the *Summa*.

In fact, Aquinas himself is not always consistent in his usage, sometimes using both eternal and divine in speaking of the same law. For instance at *Summa* 1a2ae, 93, 3, ad1,

⁶Ibid., p. 14.

⁷Ibid., p. 1.

⁸Ibid., p. 6.

⁹Ibid., p. 6.

¹⁰Ibid., p. 18.

¹¹Ibid., p. 18.

in discussing the law of sin he affirms that it is not derived from that divine law that is the eternal law.¹² However, in none of the cases in which the qualifier 'divine' is used also of eternal law is there any danger of Aquinas abandoning his distinction of eternal and divine law. This distinction is simply not relevant to the issues under discussion. In all of those cases, the term divine refers to the God who is the source of law.

1.2 Doctrine of creation overlooked

Brague notes how the topic of law comes after a discussion of providence in the *Summa contra gentiles*.¹³ But providence as a topic is part of the doctrine of creation, and this theological doctrine along with Aquinas's systematic philosophical explanation of it is the more general context for the treatment of law.

There is one passage in which Brague's neglect of the doctrine of creation is striking. Brague writes: 'the idea of eternal law makes it possible to think that there is a law common to God and his creatures, and that God, in a certain manner, submits himself to a law'.¹⁴ In treating of the eternal law in a separate question (*Summa* 1a2ae, 93), Aquinas uses the notion of an exemplar in the mind of an artist to explain that 'the Eternal Law is nothing other than the exemplar of divine wisdom in directing the motions and acts of everything' (93, 1). In further articles, he affirms that all laws derive from the eternal law (a.3), that all contingent realities are subject to it (a.5), and that all human affairs are governed by it (a.6). Of particular interest in the light of Brague's claim is the question of the fourth article, whether necessary and everlasting things are subject to the eternal law. The objections setting up the question suggest both that God is ruled by the eternal law and that God the Son is subject to eternal law. Aquinas faces the challenge, and key to his answer is the doctrine of creation. 'So then all that is in things created by God, whether they be contingent or necessary, is subject to the Eternal Law, whereas all that is attributed to the divine essence or nature does not fall under it, but in reality is itself the Eternal Law' (*Summa* 1a2ae, 93, 4). Brague's hint that the notion of eternal law might make it possible to think of God submitting himself to a law thereby forming a community of creator and creatures is not compatible with what Aquinas actually says about the eternal law as identical with the divine essence: 'We can speak of the will of God in two senses. One, to refer to his own willing, and so, since this is his very essence, it is not subject to his government or to the Eternal Law but is the Eternal Law' (*Summa* 1a2ae, 93, 4, ad1). Aquinas could not be clearer: God's willing is not subject to the eternal law. It remains a question what is the 'certain sense' in which Brague conceives that eternal law makes it conceivable that God submits to a law.

In responding to the second objection drawing on the text from I Corinthians that God the Son is subject to the eternal law, Aquinas answers: 'When he is said to be subject

¹²'non derivatur a lege divina, quae est lex aeterna'. Other passages from the 1a2ae in which Aquinas might appear to use his terms loosely are 91, 1, ad1m; 91, 4, 1 (admittedly this is the objection, in which the challenger is made to say '*Sed lex aeterna est lex divina, ut dictum est*'); 93, 5c.

¹³It should be noted that Brague claims to be working from the *Summa contra gentiles* text, but he cites the *Summa Theologiae* as much as the other source.

¹⁴Brague, *The Law of God*, p. 221. There is no mistranslation since the French original has the same idea: '*l'idée de loi éternelle permet de penser qu'il y a une loi commune à Dieu et à la creature, et que Dieu, d'une certaine manière, se soumet à une loi*', Brague, *La loi de Dieu*, p. 370.

to the Father this is because of his human nature, and likewise when the Father is said to be greater than he' (93, 4, ad2). This answer draws on the second sense of the will of God mentioned in the reply to the first objection. Christ in his human nature is subject to the eternal law, but not the begotten Son of God, who 'is himself the Eternal Law' (93, 4, ad1). So, pace Brague, where Aquinas is challenged to consider the possibility of speaking of God as submitting to eternal law, he rules it out. He does not envisage a case in which eternal law is subject to eternal law.

But perhaps Brague has another possible argument in terms of divine wisdom. The will of God in this sense refers to what God wills in creatures, and that is attributable to divine wisdom. His further quotation from Aquinas acknowledges that the eternal law is the divine wisdom and that it is *ratio*, not command. He quotes from Aquinas's discussion of justice and the mercy of God: 'For God to will anything except what is held in the exemplar of his wisdom is out of the question. It is here that the law of justice lies whereby his will is right and fair. ... God is a law unto himself' (1a, 21, a1, ad2).¹⁵ The final sentence in this quoted text is supposed to reinforce the idea that 'God in a certain manner, submits himself to a law'. However, when we look at the missing text from the quoted passage we read: 'What then he does according to his will he does justly, as also when we act according to the law we deal justly, though in our case it is the law of some superior authority, while God is a law unto himself.' Far from reinforcing a sense of communality in being subject to law, this sentence underlines the difference between God and rational creatures. God's action is just because his willing is just; we humans are just in acting according to law which is from higher authority. The contrast is reinforced when we consider those objections raised when the possibility of natural law being changed is discussed. It is suggested that biblical stories of God commanding murder or permitting adultery or theft are evidence of God changing the law (*Summa* 1a2ae, 94, 5, ad2). The response denies that the natural law is changed, but underlines the truth that while humans are bound by the precepts of the natural law forbidding murder, adultery, and theft, the creator who is the source of that law is not constrained by it. 'Nor is it only in human affairs that what God commands is just, but also in the world of nature.'

1.3 Philosophical, not theological

As noted earlier, Brague uses the notion of divine to mean *theios* and not *theos*, that is without reference to a divine person or deity. Is it conceivable that Aquinas uses the label 'divine' in this abstract sense, without reference to the creator God? Brague suggests such use when commenting on the intellectual history of the notion of law from its Stoic origins. He claims that Aquinas in writing of law as the rational plan of divine providence is drawing on a definition that precludes reference to the God of revelation. 'The definition is pagan, in fact Stoic, in origin. The adjective "divine" does not refer directly to the God of Revelation. Similar expressions can be found regarding the God-nature of the Stoics and the government of the cosmic city'.¹⁶ Of course, it is appropriate to note the intellectual ancestry of ideas and similarities between positions. But is Brague warranted, on the basis of such precedents and similarities

¹⁵Brague, *Ibid.*, p. 221.

¹⁶*Ibid.*, p. 224, referring to *Summa* 1a 2ae, 91, 1.

in suggesting that Aquinas would use the label 'divine' without any reference to the God of revelation? As noted earlier, there is in St Thomas's writing the technical meaning of divine as a label for one kind of law, but there is a general meaning insofar as all the kinds of law have a divine origin. Of divine law, it is correctly stated that these are the instances of revelation in the old and new covenants. Of course, they express and convey something of the mind of God (eternal law) for the good ordering of human life. In another sense, natural law is also revelation, being in the rational creature the natural capacity to know the right and the good, placed there by the creator. From Aquinas's perspective as a theologian, natural law is also a revelation of divine wisdom, but it is not necessarily recognised as such by human reasoners. Add to this that Aquinas maintains that human-made law retains the nature of law to the extent that it is consistent with natural law, and natural law is eternal law as received in the created rational creatures. All is traced back to the eternal law, which is identical with the divine wisdom. Aquinas summarises his listing of all the dependencies on the eternal law with a concluding sentence: 'Accordingly the Eternal Law is nothing other than the exemplar of divine wisdom as directing the motions and acts of everything' (*Summa* 1a 2ae, 93, 1). It is inconceivable that Aquinas would use the label 'divine' concerning law without having in mind the God who is creator and revealer.

In conclusion, I note that while Brague cites Aquinas's distinction between eternal and divine law, he does not attribute to it the significance that Aquinas gives it. This is because he begins his project with a general notion of the divine linked to law. He subsumes the eternal under divine, removing the reference to a God (*Theos*) and thereby misrepresenting Aquinas. While his interest is in the history of ideas, Brague does not sufficiently acknowledge that Aquinas is primarily writing as a theologian. When Aquinas speaks of eternal law, he takes as given what he has previously explained about the simplicity of God. There are no parts or properties in God; insofar as we with our limitations speak of God's Wisdom, or divine creative and providential willing, these are not separable attributes of God, but are identical with God, though given different labels because of the partiality of our knowledge.

2. The legal scholar J. Budziszewski

The second scholar whose interpretation of Aquinas on law is questionable is J. Budziszewski. The list of his publications on Aquinas is impressive. Of particular interest is his *Commentary on Thomas Aquinas's Treatise on Law*.¹⁷ He has several books on natural law based on a reading of Aquinas.¹⁸ Budziszewski is not the first to refer to the set of questions in the *Summa Theologiae* (1a2ae, 90–97) devoted to the topic of law as a treatise, somehow separable from the rest of the *Summa*. The style of the *Summa* as a compendium of theology for use in the training of pastors and preachers is to raise a series of questions and to consider arguments for and against a preferred answer.

¹⁷(Cambridge: Cambridge University Press, 2014, pbk 2016).

¹⁸*The Line Through the Heart: Natural Law as Fact, Theory, and Sign of Contradiction* (Wilmington, DE: Intercollegiate Studies Institute, 2009); *Natural Law for Lawyers* (2019); *What We Can't Not Know: A Guide* (2003).

St Thomas is deliberate in his method which he explains in the prologue to the *Summa*.¹⁹ He distinguishes two pathways of explanation: either following a process of discovery or elaborating what has been discovered. The ordering of questions and material in the *Summa* follows the pathway of exposition, the prologue specifying this approach as appropriate to the instruction of beginners. While the path of discovery might narrate, for instance, how we came to understand the phases of the moon, the path of exposition explains how the moon variously reflects the light of the sun as the moon orbits the earth, and so appears in different phases. What is prior on one path is subsequent on the other.

The explanation of law in the relevant questions of the *Summa* follows the order of exposition, beginning with a question about the essence of law and proceeding to the kinds of law, the effects of law, and then focusing on the eternal law, the natural law, human law, and, finally, divine law as in the two testaments. The presentation of law relies on an analogical usage of the terms. As Aquinas ranges over the different kinds of law, applying his five terms in different cases, we note his facility in using terms with varying meanings, albeit within a range. A community of creatures is different from a community of rational beings, which is different again from a community of faith, or a localised political community. To use the term 'community' in all four requires a facility in analogy, not equivocation, since the variation in meaning is not arbitrary. Similarly, this applies to the other notions of law, authority, and common goods.

It may be possible to provide an account of analogous predication by referring instances to a central case, but this strategy is risky. What instance of law would we take as a core instance, from which the meanings of other instances could be determined? The tendency for those coming as jurists to interpret Aquinas is that they take the instance closest to their experience, namely, human-made law as the exemplar. Aquinas's own approach is different, remaining as he does within the theological order of exposition, such that the eternal law is presented as the exemplar in the mind of God, the ultimate artificer. 'Through his wisdom God is the founder of the universe of things, and we have said that in relation to them he is like an artist with regard to the things he makes. ... Accordingly the Eternal Law is nothing other than the exemplar of divine wisdom as directing the motions and acts of everything' (*Summa* 1a 2ae, 93, 1).

In the order of discovery, we humans construct our concepts from what is familiar to us, namely, the experience of law in our human communities, and apply those concepts with relevant adjustments to the other instances. The risk in taking the case of human law as normative is that the distinctly theological perspective of the *Summa* is overlooked, and the ontological dependency of the created order on the creator as its ultimate efficient cause and its final cause is neglected. Correspondingly, the dependence of the other kinds of law – natural, human, and divine – on eternal law fades into oblivion.

Thomas Gilby identifies this problem in an appendix to the volume of the *Summa* on Law that he edited. Acknowledging their analogical usage and the sharing of terms between disciplines, he notes that 'when the positive disciplines of law and politics,

¹⁹Aquinas, 'Foreword', *Summa Theologiae*, vol. I. trans. by Thomas Gilby OP (London: Eyre & Spottiswoode, 1966), p. 3.

together with their ancillaries, discuss legality and the effective possession and performance of governmental powers they are not dealing precisely with the *lex* and *dominium* of the *Summa*'.²⁰ This continues to be the case, Gilby maintains, also when the topic under discussion in the *Summa* is human legislation and political regimes. The presence of a moral element in law, and especially natural law, may be found unacceptable to positive legal science. Gilby itemises the tensions in relation to Aquinas's definition of law. A jurist may agree with the notion of law as a reasonable ordinance but will not see it as participation in divine wisdom. The common good to be endorsed will perhaps only be that commensurate with the competencies of the civil powers and not the ultimate common good, which is God. Similarly, with promulgation and the sense of the binding force of law, the jurist within the discipline of law will not have to deal with the way the law is addressed to and received by consciences that may be bound by it.

Perhaps, J. Budziszewski slips into this tendency to base his interpretation on familiar experience when he presents Aquinas's analysis of law in terms of genus and species. Aquinas does not use these terms of genus and species when considering law, but the common notion of law and then its parts. Thomas Gilby in a footnote to the Preface in his edition of the *Summa* explains that the parts of law 'are not kinds of law strictly speaking, for law is not divided like a genus into species; for example the Eternal Law is not one sort of law among many'.²¹ This thought is continued in Gilby's commentary on question 91 concerning the varieties of law. The variety is not of species of a genus: 'The Eternal Law is not a particular kind of law, but the exemplar transcending yet causing all laws.' Furthermore, in the same note, 'the idea of law is analogical, and does not bear a fixed meaning which can be divided into separate compartments according to genera and species'.²² The same point is made again in Gilby's second appendix to the volume. Once again ruling out any reliance on genus and species, Gilby elaborates on the analogical use of law and explains it with reference to the Platonic notion of participation: 'a more-and-less of being and truth and goodness which comes when a pure perfection can be communicated in various degrees by causality'.²³

Budziszewski clearly misses this point about analogical predication when he offers as introduction to the reading of question 91 with the following commentary:

In Question 91, St Thomas considers the kinds, or varieties, of law. Although he does not continually remind us, we should bear in mind that for each of these to be a real species of the genus, 'law', it must share in the essence of law, which he has just finished investigating in Question 90. For example, if there is such a thing as eternal law, it must be in some sense an ordinance of reason for the common good, made by public authority and publicly made known.²⁴

²⁰Thomas Gilby, 'Law and Dominion in Theology', appendix 1, in *Summa*, vol. 28, p. 157.

²¹Aquinas, *Summa*, vol. 28, p. 3. Preface to 1a2ae, 90, Gilby's commentary note c.

²²Aquinas, *Ibid.*, 1a2ae, 91. Gilby's commentary note a, pp. 18–19.

²³Thomas Gilby, 'The Theological Classification of Law', appendix 2, in *Summa*, vol. 28, p. 162.

²⁴Budziszewski, *Commentary*, p. 57.

Noteworthy in this quoted text is that the commentator takes it upon himself to fill in what he admits Aquinas does not say. Expecting a reliance on a classification of genus and species, the commentator might ask why the original author did not advert to the seemingly obvious logical tool. Instead, the readers are told what they should bear in mind. As Gilby clarifies, and as Thomas's text itself confirms, there is no genus of law, but there is an exemplar, the eternal law, which is Godself.

Note how on the following page Budziszewski emphasises that 'the original, primordial law is eternal law', and he explains the natural and divine laws to be reflections of eternal law, yet his language throughout is to identify the eternal law as the prime species of law. In the extended commentary on the question of the kinds of law and specifically eternal law, he persists in designating the kinds of law as 'the species that belong to the genus of law'.²⁵ On the question of whether there is an eternal law (91, 1), he remarks that the 'Angelic Doctor is simply asking whether any law has the property of eternity'.²⁶ Such a formulation in a commentary is only possible for someone who reads these texts on law without appreciation of Aquinas's metaphysical commitments and his theological understanding that the eternal law is identical with God. There is no property of the divine which is separate from the divinity itself, whether it be eternity, or divine reason, or wisdom, or will.

3. Conclusion: restoring theology

Misunderstandings of Aquinas exemplified in the works of the historian Brague and the jurist Budziszewski are partly explained by their neglect of the theological context and content of the texts from the *Summa Theologiae* they have discussed. Taken out of context Aquinas might appear to offer a standard discussion of law, within a philosophical horizon, but attention to the context reminds us that it is part of a theological compendium.

Aquinas, at this stage in his presentation in the *Summa*, can assume that the relationship between creator and creation and creatures has been clarified in earlier discussions. He relies on several convictions that are essential for understanding his discussion. First is the dependence by participation of all that is in the pure act of being that is the divinity. Second is the ultimate goodness of the creator whose desire to share being, truth, and goodness is at the heart of the will to create. Third is the creator's providential direction of all creation, especially humankind, to an ultimate end. Fourth, that as goodness itself God is the final cause of human beings and their actions.

In their different ways both Brague and Budziszewski present distorted views of Aquinas because of their neglect of these theological premises. They both miss the referent of eternal law as identical with Godself. This is the exemplar in which all other forms of law participate. So, pace Brague, there is no law to which both creator and creatures are subject. Budziszewski can acknowledge the supremacy of eternal law, and yet continue to instance it as a species of the genus law, thereby missing out on the nature of that proclaimed supremacy.

²⁵Ibid., p. 59.

²⁶Ibid., p. 61.

The suggestion made above is that the historian is misled by his reliance for his project on an abstract notion of divinity that is intended to embrace the relevant phenomena from ancient Greek culture, Judaism, Christianity, and Islam. The predominance of this abstraction in his thought blinds him to the explicit distinction drawn by Aquinas between eternal law and divine law. It also prevents him from recognising what is distinctive in St Thomas's language, which is never simply about an abstract divinity but always about God.

It is also suggested that the legal scholar is misled by his experience of familiar models for his interpretation of Aquinas on law. The experience of human-made law provides a central case from which key terms in the definition of law are to be understood. Perhaps, it is this narrowness of focus that animates the insistence that the logical notions of genus and species must be applied when trying to understand St Thomas's various distinctions, despite the acknowledged fact that Aquinas himself does not do so.

The importance of the theological context for reading Aquinas correctly does not mean that other disciplines have nothing to gain from a study of the writings of St Thomas. The disciplines of philosophy and law can indeed benefit from engagement with Aquinas. The explanation of this possibility is that insights and distinctions generated within theological discourse can constitute genuine contributions to philosophical or legal scholarship, revealing previously unrecognised possibilities for analysis and theoretical construction. Theology can be a source of enrichment for other disciplines. At the same time, theology can provide a corrective, rescuing those disciplines from unwarranted imperialism. The recovery of the eternal law as the context for understanding instances of law, whether from a historical or a philosophical point of view, can help to relativise the specific concerns of those disciplines and remind them of the wider domain from which they fence off their own territory. Forgetfulness of that wider horizon may lead to exaggerated claims for their discoveries.

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