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## Law, Natural Law, and Human Intelligence: Living the Correlation

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# LAW, NATURAL LAW, AND HUMAN INTELLIGENCE: LIVING THE CORRELATION

Patrick McKinley Brennan\*

"Of Law there can be no less acknowledged,  
than that her seat is the bosom of God,  
her voice the harmony of the world."<sup>1</sup>

## I. WIT AND THE NATURAL LAW, THE *QUARTUM QUID*

We are created "to serve [God] wittily, in the tangle of [our] mind[s]." Sir Thomas More declares in Robert Bolt's play *A Man for All Seasons*.<sup>2</sup> More began his adult life of service of God in the self-imposed silence of the London Charterhouse, and that same life was ended for him, of course, in the isolation of the Tower of London and through the violence of Tower Hill, on account of a self-imposed silence of different inspiration. Between Charterhouse and Tower, Thomas More was as cunning as a serpent to use what considerable wit he could muster to serve God, Church, family, and state, including through law. More was "perhaps the greatest lawyer and administrator of his generation," Steven Smith observes in his essay *Interrogating Thomas More: The Conundrums of Conscience*.<sup>3</sup> And, as Professor Smith goes on to explain there, during the long interval between his two silences, More dedicated himself to working as a lawyer, in hope of ensuring that his state and his Church would continue to work together in and for the truth.<sup>4</sup> The work ended as the second silence became necessary because of the state's demand, in the name of its law, that More do what he could not do in truth. Never was the legal regime to which More was a leading contributor pure; never was it wholly fixed on the polity's serving God in

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\* John F. Scarpa Chair in Catholic Legal Studies and Professor of Law, Villanova University School of Law. For the kind invitation to participate in this symposium, I am grateful to William Wagner and Brad Lewis. Another debt of gratitude runs to Joseph Vining and Steven Smith, not just for comments on this paper but for years of conversation regarding the relationship between law's and our own possibilities. I thank Laura Henderson and Justin Heminger of The Catholic University of America for their exemplary shepherding of this paper and Ed Heffernan of Villanova for his superb research assistance.

1. A. P. D'ENTRÈVES, *NATURAL LAW* 154 (2d rev. ed. 1970)

2. ROBERT BOLT, *A MAN FOR ALL SEASONS* 74 (Heinemann Educ. Books Ltd. 1960).

3. Steven Smith, *Interrogating Thomas More: The Conundrums of Conscience*, 1 U. ST. THOMAS L.J. 580, 581 (2003).

4. *Id.* at 608.

the truth; never has mankind been the beneficiary of a fully worked out jurisprudence. In doing what he could through the law of a state that was basically but imperfectly respectful of the truth about human living in the divine plan, the Saint understood himself to be serving God wittily. He prayed for as much, knowing that the minds we have are tangled, the world in which we are given to serve, knotty.

*Law's Quandary* is a profound and sagely worded inquiry into what we are—or should be—up to in the name of law. Through a probing dialectical analysis of the relationships between our legal practice and our justificatory apparatuses, the book drives the reader to ask, perhaps for the first time in earnest: “Where in the world is the law for us?” Not content with the Legal Realists’ diet, but clear-sighted about the doubts that have been aired concerning doing law “the old-fashioned way,” Steven Smith is led to wonder whether we are capable of law anymore. *Law's Quandary* occupies a place in that small circle of works in jurisprudence that could actually matter to our living.

I consider the gravamen of *Law's Quandary* to be, first, that many of the terms, operative presuppositions, and practices by which we act in the name of the law today are out of alignment with the “ontological inventories” that we (or many of us) are willing (and sometimes proud) to own, and, second, that, therefore, (frequently) when we talk or act in the name of the law, we commit “nonsense.” Nonsense, as Smith intends the term, is what one gets when one treats as real things that do not appear on one’s ontological inventory, one’s list—implicit or explicit—of that which exhausts the real.<sup>5</sup> Law as we practice it, Smith contends, depends upon a baroque ontology that includes realities denied by today’s academic metaphysicians and, at least on state occasions, by many of law’s practitioners and theorists; above all, as practiced today, law still looks to a “higher law,” of which the quotidian statements of law are said to be merely evidence. *Swift v. Tyson*<sup>6</sup> was overruled and is officially discredited (Judge Posner is sure that *Swift* was based on an “epistemological error”<sup>7</sup>); according to Smith, however, its jurisprudential commitments live on in today’s practice. The proposition, which *Swift* uttered and applied, that our statements of law are more or less adequate approximations of a higher law, Smith captures under the label the “classical view,” and he finds this view, though widely

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5. STEVEN D. SMITH, *LAW'S QUANDARY* 13-14 (2004) [hereinafter SMITH, *LAW'S QUANDARY*]; see also Steven D. Smith, *Nonsense and Natural Law*, in *AGAINST THE LAW* 100, 100-03 (Paul F. Campos et al. eds., 1996).

6. 41 U.S. (16 Pet.) 1 (1842), overruled by *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

7. Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 763 (1987).

repudiated by a century of theorists, persistently at the heart of today's practice.

Having found an impressive incongruence between law's metaphysical assumptions and commitments and its practitioners' ontological inventories, and having found, therefore, a lot of nonsense on the loose, Professor Smith asks whether the generators of all this nonsense should be diagnosed with "bad faith," and a peculiar strain of bad faith at that. Unlike the pastor who has lost his faith but retains a desire to inhabit the parsonage (and therefore pretends for all to see that the god still exists), the bad faith practitioners of law Professor Smith observes *both* regularly invoke and rely on law's metaphysically robust terms *and* deny those terms' validity or truth. In Smith's own words:

[T]hey persist in the practice while *denying* its ontological presuppositions. They avow belief *in the practice*, that is, but not in *the metaphysical premises that seem necessary to support the practice*.<sup>8</sup> Or, to shift to the religious vocabulary, if contemporary law is a species of idolatry ['the continuation of God by other means'], it is a peculiar and confusing sort of idolatry in which the devotees regularly *deny* that the idol has the transcendent qualities it would need to justify the uses they make of it.<sup>8</sup>

The perversity of this apparent "bad faith," this operative self-contradiction—that is, law's practitioners' actively undermining the very practice in which they are engaged—leads Professor Smith to propose another possible diagnosis:

[A]lthough lawyers and judges might be in bad faith when they engage in the *practice* of law, their overall behavior seems more consistent with the hypothesis that the self-deception occurs when they engage in explicit *theorizing* about law—and when in the course of such theorizing they deny the metaphysical commitments that they in fact hold.<sup>9</sup>

Having sketched this second possibility—that the testimony of our performance is more probative than that of much of our theorizing—Professor Smith backs away from its possible implications, indicating that if we agree with him we shall be left choosing as he does "between speaking nonsense or . . . standing in silence."<sup>10</sup> Stranded in an "ontological gap" between what conditions law's performance presupposes and regnant ontologies that deny the satisfaction of those conditions, the question remains whether we who are born late are

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8. SMITH, LAW'S QUANDARY, *supra* note 5, at 164.

9. *Id.*

10. *Id.* at 179.

capable of law. Smith answers, in part: "'Nonsense' describes a sort of intellectual dereliction, or a miscarriage of cognition and articulation; but it does not necessarily signify an inability to function."<sup>11</sup> Still, Smith finds himself and others in a position of perplexity, and the book ends as follows:

Perplexity is not a resting place, to be sure, and it is uncomfortable (as some of us can attest) to have to be constantly choosing between speaking nonsense or just standing in silence. So we will surely continue, as Socrates did, to seek to enhance our understandings, or to fill in our ontological gaps. But in the meantime—and we look to be in the meantime for quite a while—and on the Socratic premise that “it is the most blameworthy ignorance to believe that one knows what one does not know,” we would perhaps be wise to confess our confusion and to acknowledge that there are richer realities and greater powers in the universe than our meager modern philosophies have dreamed of.<sup>12</sup>

The iconic More whom I sculpted at the outset suggests a starting point for an answer to Smith's quandary. First, understand what it is to understand—understand, that is, what it is to be “witty,” by which More meant not funny, but intelligent in your knowing and responsible in your acting,<sup>13</sup> and you will be on your way to understanding how to meet life's possibilities and demands, including through law. Second, take our successful performances in law as a guide to how to be witty in human living. “[L]aw is evidence of view and belief far stronger than academic statement and introspection can provide,”<sup>14</sup> as Joseph Vining says in language Smith himself quotes in exploring the possibility that we or many of us are “tacit neoclassicists.”<sup>15</sup> Not long ago, I overheard a radio commercial assert: “Even the law of gravity is just a suggestion,” this as part of an advertising pitch for an upcoming “lawless broadcast.” Happily, I was not around when that broadcast issued; more happily, even citizens listening to such broadcasts seem generally to obey the law; and this because most people in this country, philosophically impoverished and benighted though we may be, do not treat the Constitution of the United States and the laws made in pursuance thereof as mere suggestion, although it needs to be added right away that, first, our collective living by them remains a choice and, second,

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11. *Id.* at 21.

12. *Id.* at 179 (footnote omitted).

13. See 20 THE OXFORD ENGLISH DICTIONARY 468 (2d ed. 1998).

14. SMITH, LAW'S QUANDARY, *supra* note 5, at 171 (quoting JOSEPH VINING, FROM NEWTON'S SLEEP 5 (1995)).

15. *Id.* at 170.

some phases of living by these laws involve the coercion of the sheriff (and when sheriff arrives, law has in some sense already failed). To my mind, the evidence that is what we *do* in the name of law mercifully saves us from having to suppose that people mean many of the things that get said today, even or especially in the philosophy of law. Our (relative) success in doing law cannot be wholly undone by talk that is sometimes cheap and philosophies that are always in need of improvement. To serve God wittily, in the tangle of our minds, is at least an honest day's work, in law.

Law as we ordinarily speak of it is a tool, a tool not to the hand or to the eye only, but principally to intelligence in search of worthy human living, living, that is, that is *good* for us. In what we do in law, the object of our intelligence is the *good*. Talk about the good is out of fashion in jurisprudence, of course, and many attempts to implement the good through law are outlawed by the (non-binding) rules of political liberalism. I, however, understand the good to be ineliminably the central aim, justification, and exigence of what can be done in the name of law, even—*mirabile auditu*—in this pluralist democracy of ours. In the words of St. Thomas Aquinas in his *Commentary on the Nicomachean Ethics* of Aristotle: “the end of politics is the human good,”<sup>16</sup> and law is the tool, first, of the person(s) who has (have) charge of the political community and, second, of those whom he (or they) rule. It is in the nature of law to aim for the good of those whose rule of living it would be, and neither Aristotle nor his commentator makes an exception for a people who have decided to rule themselves democratically. If the goals sought in and through “law” fail to be good for us, and to the extent our “legal” means of implementing worthy goals are wrongheaded, what we are up to falls short of law, at least where “law” is understood as something to be obeyed (rather than merely complied with as a matter of calculation and strategy). If we cannot adjudge actions taken in the name of the law as somehow contributing to what is genuinely good for us humans, then, as Francis Cardinal George observes, we cannot but experience such intrusions upon our self-direction “as an unintelligible restraint.”<sup>17</sup> How could it be otherwise? How can we intelligent creatures be obligated (as opposed to “obliged”) to what is not good for us? “Remove or forget the Good and law inevitably becomes legalism.”<sup>18</sup>

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16. ST. THOMAS AQUINAS, IN DECEM LIBROS ETHICORUM ARISTOTELIS AD NICHOMACHUM EXPOSITIO para. 29, at 8 (Raymundi M. Spiazzi ed., 3d ed. Marietti 1964).

17. Francis George, *Law and Culture in the United States*, 48 AM. J. JURIS. 131, 146 (2003).

18. RUSSELL HITTINGER, THE FIRST GRACE 28 (2003).

In suggesting that law as we ordinarily speak of it is a principal tool in the project of realizing the human good, I do not blink the fact that in its decadent forms "law" can be a lot less, and is so in the hands of certain lawyers, law professors, and judges in every generation, and perhaps especially in our own. What Flannery O'Connor observed will remain true: "[I]n us the good is something under construction,"<sup>19</sup> and we are always obligated (and obliged) to carry that work forward the only way we can, which is wittily, in the tangle of our minds. Neither the fact of pluralism nor a normative commitment to democracy renders law that is not good for us better than the aforementioned "unintelligible restraint." Law that is correlative to our human nature is intelligible to us, and our intelligence finds in it reason to follow it. The tradition has referred to such law as the *natural law*, a correct understanding of which will be instrumental to dissolving quandary in the vicinity of law and getting on with the work of constructing the good.

But first I would anticipate an objection. I have heard it said, in the name of the United States' commitment to democracy, that "God applies the natural law."<sup>20</sup> In the memo I received, however, it was and remains we who are to be its implementers—this at our individual and collective peril, for what the natural law requires, as I think, is that we seek and instantiate the good for us and avoid what is not good for us. Implementing the natural law is a rather low-flying business, you might then say—and in a way, that will be the point. Though, quite appropriately, the texts that the authorities in this republican democracy create in the name of the law—think of the Administrative Procedure Act of 1946 and the judicial opinions that give it effect today—do not talk the language of the good, these linguistic tools of ours are the workings out of the specialized conceptual and analytical devices that are productive of worthy human goals, e.g., a rational and fair administration of state assistance to the needy. Assuming a certain set of facts, this is the implementation of the natural law, and it's eminently bread and butter. However, and at the same time, such implementation of the natural law is also our human glory, a participated theonomy (as John Paul II called it in *Veritatis Splendor*),<sup>21</sup> freely to choose and make effective God's law for us and, thereby, to come to our perfection by

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19. FLANNERY O'CONNOR, INTRODUCTION TO A MEMOIR OF MARY ANN (1961), reprinted in FLANNERY O'CONNOR: COLLECTED WORKS 830 (Sally Fitzgerald ed., 1988).

20. Antonin Scalia, Assoc. Justice, U.S. Supreme Court, The Common Christian Good, Speech at the Gregorianum University Symposium on Left, Right, and the Common Good (May 2, 1996) (transcript available at <http://www.learnedhand.com/scalia.htm>).

21. POPE JOHN PAUL II, THE SPLENDOR OF TRUTH: *VERITATIS SPLENDOR* para. 41, at 57 (Vatican trans., St. Paul Books & Media 1993) (emphasis omitted).

instantiating in ourselves and our communities the goods of our human nature.

Sadly, the good never surfaces in *Law's Quandary*, at least not quite, and this fatal failure of the good to emerge, I shall argue, is the consequence of the author's elision of the classical position on law. As I read the book, Professor Smith adumbrates this (false) trilemma: *either* getting along with "law" that respects nothing higher than itself (though continuing to talk the talk of higher law); *or* "the classical position," that is, *somehow* conforming to an "overarching" "ontological order;" *or* Socratic perplexity. Judging the first to be nonsense, and finding the second to be currently unavailable, Professor Smith is driven to the third horn of his trilemma. I shall respond to the trilemma by proposing a *quantum quid* that is neither nonsense, nor the classical position as Professor Smith understands it, nor perplexity. The proposed rescue comes in what Smith overlooks in the classical position, as I receive it: If we are to serve God wittily, indeed, if we are to observe the natural law as the classical position understands it, we must first get to know ourselves: the way to the good and back to God is through mastery of the natural means God has given us. Christian believers affirm that *supernatural* grace, too, plays a part in this, of course, and the details of grace's *how* matter; but for purposes of the current analysis, I am going stipulate to St. Paul's assurance as to the Lord's assurance: "My grace is sufficient for thee."<sup>22</sup> God has created and called us, and thus made it possible for us, to serve him wittily, in the tangle of our minds. Through our wit we are given to discover and implement in our living the natural law that God has promulgated in our very selves. Thus, to begin to decipher my title, what will be law for us neither exceeds nor fails to meet our human intelligence: the two must be in a living correlation. In additional language that Smith quotes from Joseph Vining: "[T]he question of what the law 'is' is not so very different from the question of what we 'are.'"<sup>23</sup>

## II. SITUATING THE NATURAL LAW

### A. Giving Natural Law the Slip

Most of the questions of law that our courts are called upon to decide are pretty meat and potatoes, thank God. An example that comes to mind is whether without the consent of the Commonwealth of Pennsylvania probation officers employed by the Commonwealth could

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22. 2 *Corinthians* 12:9.

23. SMITH, *LAW'S QUANDARY*, *supra* note 5, at 173 (quoting VINING, *supra* note 14, at 128).



sue the same in its own courts for alleged violation of the overtime provisions of the Federal Fair Labor Standards Act of 1938. The Supreme Court's answer, given in the 1999 decision *Alden v. Maine*,<sup>24</sup> is a resounding *no*. Because such a suit would be inconsistent with the "sovereign dignity" of the Commonwealth, the Court explains, the law does not allow the suit.<sup>25</sup> But how do the Justices know this? On what basis do they make this statement of law? Is it possible that the natural law itself gives an answer to the question presented? This latter course certainly is not the one the Court claims to have pursued; indeed, Justice Kennedy's opinion for the majority vehemently denied the dissent's accusation of natural lawyering, although it is worth noting in passing that the picture of natural law developed by Justice Souter in dissent bears scant relationship to natural law as it has generally been understood in the central tradition.<sup>26</sup>

Whatever the true basis of the *Alden* decision (to which I shall return briefly, at the end), the possibility of a world in which judicial officers decide the disputes before them by consulting the natural law directly, and without any mediating statements of law or evidence of law, is worth pursuing for the light it sheds on Professor Smith's treatment of the classical position. If the natural law included answers to such questions as the one presented in *Alden*, and if the judges in fact consulted the natural law and followed it in their deciding, then this hypothetical legal regime would satisfy anti-Austinian aspiration to "a rule of laws, not of men." The natural law, however, has never been thought by its proponents, so far as I am aware (and its detractors are another story, which I'll address in a moment), to include answers to such questions as whether the Congress of the United States in the year [x] can compel a state [y] to adjudicate a claim for money damages based on federal cause of action [z].<sup>27</sup> But what if we ask the question at a level of greater abstraction? On the classical position, does the natural law determine whether citizens should be able to sue their state for damages caused by the agents of the state?

On the natural law, *Law's Quandary* is signally sparse. I say "signally," because in a book that teases with the possibility that the classical position might be the way to go (if only we could), the natural

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24. 527 U.S. 706 (1999).

25. *Id.* at 715, 727.

26. *Id.* at 795-98 (Souter, J., dissenting) (attributing natural lawyering to the majority).

27. On Aquinas's view, *determinationes* are contained in the *eternal* law, but not in the natural law. See ST. THOMAS AQUINAS, SUMMA THEOLOGIAE, at Pt. I-II, Q. 91, Art. 3 (3d. ed. San Paolo 1999). On the relationship between the eternal law and natural law, see *infra* Part II.B.

law should be conspicuous not by its reservation. Natural law constitutes the core of the classical position on how we mortals are to structure and judge law and politics, but I am not sure that the phrase "natural law" appears at all in the text of *Law's Quandary*; though it does appear in a footnote,<sup>28</sup> there it is advanced as a synonym for "law of nature," which does appear in the book's index, while "natural law" does not.<sup>29</sup> In the end, I am not sure that the *concept* of the natural law, as understood in the classical tradition, is present in *Law's Quandary* at all, and it is this omission/suppression, I would suggest, that makes the classical position seem so remote as to be unapproachable. Can it be a surprise that omission/suppression of the law that is correlative to our human natures leads to perplexity and quandary?

It is worth watching carefully how the omission/suppression occurs. Professor Smith starts by identifying legal practices of ours that treat judicial decisions (and maybe even statutes and the Constitution itself) as *evidence* of what "the law" is, rather than as the law itself. These practices of implicitly (and sometimes explicitly) affirming a higher law to which human decisions and enactments must conform (if they are to be law), Smith suggests, are living remnants of the aforementioned classical view, which view Smith then proceeds to associate with such great names in the English legal tradition as Coke and Blackstone. Whereupon Smith proceeds immediately to observe: "Perhaps the most systematic working out" of this "worldview . . . had been performed centuries" earlier, on the Continent, by Thomas Aquinas.<sup>30</sup>

Explicating what he takes to be Aquinas's position, Smith explains that "human or positive law derives from the 'eternal law,' which is the divinely ordained order governing the universe, and positive law gains its status as law by virtue of participating in that order."<sup>31</sup> Smith continues, quoting Aquinas:

"Since then the eternal law is the plan of government in the Chief Governor," Aquinas explained, "all the plans of government in the inferior governors must be derived from the eternal law." And it followed that "every human law has just so much of the nature of law as it is derived from the law of nature."<sup>32</sup>

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28. See SMITH, *LAW'S QUANDARY*, *supra* note 5, at 185 n.12.

29. *Id.* at 204-05.

30. *Id.* at 46.

31. *Id.* (emphasis omitted) (footnote omitted).

32. *Id.* (footnote omitted) (quoting ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE* I-II, at Q. 93, art. 3, Q. 95, art. 2, *reprinted in* THE POLITICAL IDEAS OF ST. THOMAS AQUINAS 34, 58 (Dino Binongari ed., 1953)).

It is at this point that Smith drops the footnote that mentions the "natural law." Glossing the just-quoted language of Aquinas's *Summa Theologiae*, Smith explains: "The 'natural law' or law of nature is that part of the eternal law that is accessible to human reason without the aid of divine revelation."<sup>33</sup> With this gloss in place, Smith rounds out his summary of Aquinas's position on human law's relationship to higher law by quoting Thomas's admonition that "'if in any point [the human law] deflects from the law of nature, it is no longer a law but a perversion of law.'"<sup>34</sup>

Smith next anticipates "[a] possible misconception, which leads to a familiar and dismissive caricature, [that] must be guarded against here. The classical position as expounded by thinkers like Aquinas," Smith continues, "did not naively suppose that there is, say, a sort of ghostly Internal Revenue Code in all of its magnificent detail written in the heavens, and that the Code we find in our more terrestrial tax volumes is merely a mundane photocopy of the celestial original."<sup>35</sup> Because we live after Holmes and his 1917 installation of the "brooding omnipresence in the sky" caricature of the natural law,<sup>36</sup> this is a salutary point of clarification. On the genuine classical position, according to Smith:

A few legal rules, such as the prohibition of homicide, might be derived directly from—"read off of," as we say—the eternal law. But the overwhelming bulk of positive law consists of the detailed specification, or *determinatio*, of what the eternal law gives only in generalities. Such specifications are the product of judgments by human legislators, whose pronouncements have the status of law. Even so, the legal status of such pronouncements depends on their indirect derivation from the eternal law, and they should be understood and interpreted in accordance with that overarching reality.<sup>37</sup>

The important positive point that Smith makes here, against the caricature, is that, on the classical view, most of the particular decisions or rules implemented by human legislators are humanly-wrought *determinationes*, that is, determinations or specifications of matters left indeterminate and unspecified by higher law. There may be some people who once believed, and there certainly are great jurists who said, that the whole body of human law is found, not made; but by now, as Mary Ann

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33. *Id.* at 185 n.12.

34. *Id.* at 46 (alteration in original) (quoting AQUINAS, *supra* note 32, Q. 95, art. 2, reprinted in THE POLITICAL IDEAS OF ST. THOMAS AQUINAS 58 (Dino Binongiarì ed., 1953)).

35. *Id.* at 47.

36. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

37. SMITH, LAW'S QUANDARY, *supra* note 5, at 47.

Glendon says, "[N]o American adult needs to be told that we live under a rule of men in the sense that laws are made, interpreted, and administered by real men and women."<sup>38</sup> This is as it should be, but from this it does not follow that those with responsibility for governing the political community through law are not obligated by (even if, alas, they ignore) a natural law.

The wrinkle in Professor Smith's analysis, I think—and it is a wrinkle that once pressed into the fabric of the analysis leads irresistibly in the direction of the false trilemma—concerns our human connection, so to speak, to law not of our making. Before proceeding further I should be perfectly clear that, although I am following Professor Smith's sound lead in turning to the texts of Aquinas for an indication of the classical position, for me, as for Professor Smith, the issue is not exegesis of Aquinas, but instead an alleged quandary caused by our tergiversating abandonment of the classical stance. On my reading, to the extent Aquinas indicates the classical position (and if Aquinas does not, then who does?), we confront a more layered legal world than Smith allows, and it is in the missing layer that, for better or worse, we've always lived, because that is the level on which we are given to live. Professor Smith is I think right that many have lost their jurisprudential moorings, but I conclude that Professor Smith misses an essential link in those moorings as they have classically been (and might still be) conceived. To borrow a line from the late legendary San Francisco columnist Herb Caen, things aren't as good as they used to be, and they never were.

### *B. Our Participation in the Eternal Law*

Turning to some particulars, Professor Smith is correct that the classical position as expounded by Aquinas denies that anything is a law that is not derived from the eternal law, a point Thomas makes by quoting St. Augustine approvingly: "[I]n temporal law there is nothing just and lawful, but what man has drawn from the eternal law."<sup>39</sup> Smith's explication of the "eternal law" as "the divinely ordained order governing the universe"<sup>40</sup> is fine as far as it goes, but it does not go far enough. On Aquinas's account, the eternal law just is the divine mind providentially governing all of creation to its proper and common goods, the *bona propria* and the *bonum commune*. That governing providence takes one form in respect of nonrational beings, a form appropriate to their lack of freedom to do otherwise. With respect to rational creatures and the human person in particular, God's governing providence is in the

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38. MARY ANN GLENDON, *A NATION UNDER LAWYERS* 10 (1994).

39. AQUINAS, *supra* note 27, at Pt. I-II, Q. 93, Art. 3.

40. SMITH, *LAW'S QUANDARY*, *supra* note 5, at 46.

nature of a rule that can be obeyed (or disobeyed). "Now among all others, the rational creature is subject to Divine providence in the most excellent way, in so far as it partakes of a share of providence, by being provident both for itself and for others."<sup>41</sup> The human person's *participation* in the eternal law just is the natural law.<sup>42</sup> As promulgated in every human person, the natural law orders the person toward his or her proper goods and toward the common good; as beings created with reason and freedom, it falls to us by the divine plan to implement (or not) God's law for us, and that law is the natural law.<sup>43</sup>

*Law's Quandary* never gives us the natural law as classically understood; indeed, in the text of Aquinas glossed by Smith in the aforementioned footnote, in which Smith identifies the natural law with the "law of nature," the translator (not Smith) has misleadingly rendered Aquinas's "*lex naturalis*," that is, natural law, as "law of nature." *Lex naturalis* is not a mere metaphorical periphrasis for "nature" or nature's statistical regularities.<sup>44</sup> On Aquinas's analysis, the providential God has promulgated a law in (and for) us, a prospect wholly absent from the cosmology bequeathed by Aristotle to Aquinas; the whole thrust of Aquinas's thought as concerns law, *lex*, is to work out providence as an ordinance of reason in God's mind that goes forth in his rational creatures for their acceptance in freedom, thus leading them to their proper and common goods. In saying in a footnote gloss that "[t]he 'natural law' or law of nature is that part of the eternal law that is accessible to human reason without the aid of divine revelation,"<sup>45</sup> Smith occludes the fact that there is a genuine law, which we are supposed to be following, that is promulgated right here within our very selves. To direct us toward an "overarching reality" is to direct us away from the very site of the promulgation of the natural law; it is, in a way, to turn us against our better selves.

Before saying more about getting to know the natural law and what it might mean for legal practice and jurisprudence today, I should say that behind Professor Smith's otherwise puzzling obnubilation of the natural law lurks, I sense without knowing, a healthy fear of much of what is said

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41. AQUINAS, *supra* note 27, at Pt. I-II, Q. 91, Art. 2.

42. For an elaboration and analysis of the doctrine of "participation" in Thomas's metaphysics of law, see Craig A. Boyd, *Participation Metaphysics in Aquinas's Theory of Natural Law*, 79 AM. CATHOLIC PHIL. Q. 431 (2005).

43. For a contemporary attempt to retain the classical position but without God and the eternal law, see ANTHONY J. LISSKA, AQUINAS'S THEORY OF NATURAL LAW 116-38 (1996).

44. See HITTINGER, *supra* note 18, at xxvi, 7. Occasionally, Aquinas does write *lex naturae* where one would expect *lex naturalis*, but his meaning remains clear and unchanged. See, e.g., AQUINAS, *supra* note 27, at Pt. I-II, Q. 95, art. 2, at 961.

45. SMITH, LAW'S QUANDARY, *supra* note 5, at 185 n.12.

today in the name of natural law. On Aquinas's analysis, it bears emphasis, natural law is truly *law*: Aquinas defines law as an "ordinance of reason," promulgated by the person (or persons) charged with care of the community, for the common good.<sup>46</sup> At the law's source is a reasoning promulgator, and the law just *is* an ordinance of reason. In many contemporary expositions of the natural law, by contrast, the so-called natural law's properly legal character has seeped (or been squeezed) out. In some iterations, for example, one finds instead human practical reason ungoverned by law; other times one finds natures that are "laws" unto themselves, a reinvigoration of the "law of nature" idea that, as I mentioned, Aquinas sought to domesticate to God's providence.<sup>47</sup> On the classical position, by contrast, law's conditions are satisfied neither by self-generated norms of practical reasoning (about human nature) nor by natures themselves: Law in the proper sense is in mind, not in things—first in the mind of the lawgiver, then in the minds of the governed. Make no mistake about it: On the classical position of Aquinas, there is simply no law without a (reasoning) promulgator, lawgiver, legislator.<sup>48</sup>

### C. Living the Natural Law

I turn now to a brief survey of the important terrain eclipsed in (and productive of) *Law's Quandary* for what it can contribute to what we do today in the name of the law. An accurate grasp of the classical line will have practical implications for a response to the second half of *Law's Quandary*, to which I turn in Sections III and IV. These appear only once one looks down from the illusory heaven of an overarching reality to begin to discover the legal reality here below.

According to the classical position, in promulgating the natural law, the divine legislator works through human nature itself; our participation in the eternal law occurs through our given natures, and on two levels. On one level, we humans participate in the eternal law simply by our being directed to specific goods by our created nature; God's law for us is present in us naturally through *inclinationes* toward our goods, not just any inclinations but those inclinations that have (in the phrase of Jacques

46. AQUINAS, *supra* note 27, at Pt. I-II, Q. 90, Arts. 1-4. For contrasting views on how much of Aristotle's cosmology of nature Thomas retained, compare WALTER ULLMANN, *A HISTORY OF POLITICAL THOUGHT: THE MIDDLE AGES* (rev. ed. 1970), with HARRY U. JAFFA, *THOMISM AND ARISTOTELIANISM* (1952).

47. For an analysis of examples, see HITTINGER, *supra* note 18, at 46-50.

48. On the natural law *as law*, see *id.* at 39-62, JEAN PORTER, *NATURAL AND DIVINE LAW* 156-64 (1999), and Stephen L. Brock, *The Legal Character of Natural Law According to St. Thomas Aquinas* (1988) (unpublished Ph.D. dissertation, University of Toronto) (on file with author).

Maritain) "passed through the lake of Intellect (functioning unconsciously)."<sup>49</sup> Man's directedness to his goods rises up into intelligence, and this is natural law on its first level. Then, on the second level, "men and women" (as Pamela Hall explains) "also partake in the eternal law by their knowledge and choice: (1) they must recognize certain *inclinationes* as normative, as ordering them toward specific goods; and (2) they must discover and choose the means by which they can achieve the goods to which they are so directed."<sup>50</sup> There are goods toward which humans are directed through certain of their inclinations, and these they are obligated to try to discover; furthermore, they are obligated to find and select the means by which they can instantiate these goods. "To be instructed in the natural law, we must engage in a kind of practical reasoning that is itself both self-education and self-discovery," explains Pamela Hall.<sup>51</sup> She continues:

Natural law is not a theoretical knowledge of propositions; rather, it is a possession of ends and of ways of discovering means to those ends. Our discovery of the natural law occurs by way of reflection upon our natures and then by discovery of the necessary means for achieving or constituting the goods of our natures. These means include the formation of rules to help secure and constitute the good for us. We both give the law to ourselves and discover it.<sup>52</sup>

There are two interrelated claims here: First, the human person's goods are given, the rule for his living is promulgated in his nature through inclinations that rise up into intellect; second, the person's freedom is to discover those goods and the means for implementing them. The human person's participation in the divine providential ordering governance is free: We must use our created intelligence to discover the natural law and the means of its implementation. Hall thus continues:

Only by the free exercise of our practical rationality could we discover the natural law . . . , and this discovery would involve in part doing over again the work of the first legislator, God. In that sense, God first manifests his providence through the eternal law (in which natural law participates), and so directs all creatures to himself. Just so, men and women imitate (and yet

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49. JACQUES MARITAIN, AN INTRODUCTION TO THE BASIC PROBLEMS OF MORAL PHILOSOPHY 54 (Cornelia N. Borgerhoff trans., Magi Books 1990). For a compendious treatment of Maritain's application and development of the Thomist position on natural law and the good, see Patrick McKinley Brennan, *Jacques Maritain (1882-1973)*, in 1 THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE 75-114 (John Witte Jr. & Frank S. Alexander eds., 2006).

50. PAMELA HALL, NARRATIVE AND THE NATURAL LAW 37 (1994).

51. *Id.* at 29.

52. *Id.* at 37 (footnote omitted).

obey) divine providence by directing themselves in discovering and pursuing their good. They follow divine providence by being provident for themselves.<sup>53</sup>

It is by getting to know ourselves, then, that we get to know the natural law, and implementing the natural law means achieving or constituting the given goods of our nature.<sup>54</sup> The reality is not overarching: It is within, not as a predicate of our human nature, but rather as God's regulating addition. Russell Hittinger notes:

The radical implications of Thomas's teaching should be evident. Every created intelligence not only has a competence to make judgments, but to make judgments according to a real law—indeed, a law that is the form and pattern of all other laws. Thus, the legal order of things does not begin with an acquired virtue, possessed by a few; nor does it begin with the offices and statutes of human positive law; nor does it begin with the law revealed at Sinai. God speaks the law, at least in its rudiments, to every intelligent creature.<sup>55</sup>

If, then, we serve God, we do so wittily, in the tangle of our minds, under law.

And this leads me to emphasize a crucial point frequently neglected by the tradition and of surpassing significance to dissolving the quandary in *Law's Quandary*: The discovery of the natural law promulgated within us takes place "within a life,"<sup>56</sup> the life of an individual but, more efficaciously, in the life of a whole community (or community of overlapping communities), over time and not all at once. Each of us holds the first principles of the natural law in that mental *habitus* Aquinas calls *synderesis*, but these are only a beginning, starting points. Every individual's success in implementing the natural law turns in part on the antecedent and concomitant success of the community in creating means for discovering and implementing the natural law. We do not go it alone, or at least we should hope that we don't have to try to do so. And although prophets, saints, and reformers make their mark at decisive moments in history, the ordinary way by which the natural law enters human living is through individuals' forming and subordinating themselves to communities that embody effective means of discovering and implementing the natural law, always attentive to need for self-correction if the construction of the good in us is to go forward according

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53. *Id.* at 38 (footnote omitted).

54. Another source of learning about the content of the natural law is the divine law, both old and new, which God promulgates because of the infirmity of our fallen capacities. See *id.* at 45-91.

55. HITTINGER, *supra* note 18, at 98.

56. HALL, *supra* note 50, at 37.



to the natural law. Among the means that ordinarily serve the entrance of the natural law is positive law, with the authorities it presupposes. The entrance of the natural law into lived history is the controlling goal; the means of its entrance are for humans to work out through trial and error, as to which more in a moment.

Although Professor Smith rightly rules out the celestial Internal Revenue Code model of the classical view, its Platonic shadow slips back in, I fear. Professor Smith's version of the classical position is misleading and incomplete because it does not set out the particular given means by which we *naturally* participate in the eternal law: practical reason discovering and implementing the natural law. It is not a matter of *somehow* conforming to an "overarching reality"; rather, it is a matter of progressive and cumulative practical insight into the law promulgated within ourselves. To be sure, many moderns find even this halfway house too much to swallow, but my point is that there exists an intermediate position and it speaks to how God governs us here and now toward our goods. It is the classical position as Aquinas developed it and as we might appropriate it; not mysterious conformity to an overarching reality, not knowledge of propositions, not a work of theoretical reason, but, rather, an imitation of divine providence through discovering and giving the natural law to ourselves. On this view, the making effective of natural law in history depends on our growing in self-knowledge and implementing means of making the law for us effective. An individual's, a community's, a culture's growth in knowledge of the natural law takes time, must be cumulative and progressive, and must meet changed circumstances. It was for this reason that Jacques Maritain could make the otherwise perhaps startling observation that it is the essence of political absolutism and tyranny for the terrestrial lawgiver to be subject to no law other than the natural law.<sup>57</sup> Instructively, Maritain's rejection of rule directly according to the natural law occurs in the context of his rejection of claims on behalf of political "sovereignty," a point to which I shall return in concluding.

### III. TEXTS IN THE CONTEXT OF OUR LEGAL PRACTICE

I have suggested how the *particular* way in which the classical position (as set out by Aquinas) subordinates man to a law not of his making leads proximately to the human person's being subordinated to community and its authority. This point wants more development, and it will receive some here as my angle of analysis now shifts to track Professor Smith in the prosecution of *Law's Quandary*. At the beginning of Part III of the book Professor Smith turns from the question whether

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57. JACQUES MARITAIN, *MAN AND THE STATE* 31 n.12 (1951).

higher law is necessary to law as we ordinarily practice it, to the significance of the quotidian texts we use in this legal practice of ours. "Forget the last two chapters," Professor Smith invites the reader, for after all, it is texts—not "the law"—that ordinarily receive our attention when we are looking to make a statement of law, and some people go nearly so far as to say that the law is only what is written down.<sup>58</sup> Consideration of the "questions lawyers ask every day . . . will eventually," Smith predicts, "lead us around to approximately the same underlying issues that we have already been considering. . . . The central inquiry for this part of the book is: How does law mean?"<sup>59</sup> What follows in the next two chapters is a *tour de force* of contemporary legal hermeneutics and a devastating critique of those theories that would find "meanings without authors." I shall agree in the main with Professor Smith's conclusion as to how we should read texts in law, but my reasons for reaching this conclusion follow from the account of natural law I have just given, not solely from the nature of language or semiosis as such.

There is no mystery about why texts are created and given focal attention in what we do in the name of law. Memories are weak, and even the best tend to fade; and paper barriers, though not weighty in the way sticks and stones are, have the capacity to communicate (*inter alia*) what those who came before learned (or failed to learn) about how humans can implement the natural law. Texts created as contributions to our efforts to become lawful free the generations from having to reinvent the wheel, though of course they do not—because they *cannot*—free the generations from the personal and communal obligation to continue the construction of the good. Every moment of life is a fresh opportunity, indeed exigence, to continue to implement the natural law; if we are not implementing the natural law, we are not instantiating the goods commanded of and offered to us. Writings can help us in this process of implementing the natural law, but writtenness is not in the essence of law, as evidenced by the natural law and the eternal law; indeed, as already indicated, the point is the stronger one that law, strictly speaking, is only in reason, *in intellectu*. But though law is not strictly speaking "in" the writings, it *is* our practice—from our written Constitution right on down—to turn to texts in aid of making statements of law. But to which texts do we turn? And in search of what do we turn to them?

An analogy may help get the analysis started. In the Catholic tradition, there was (and in some quarters there still is) a way of doing theology that came to be caricatured as "Denzinger theology." This method of theology takes the epithet by which it is known from the name

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58. SMITH, LAW'S QUANDARY, *supra* note 5, at 97.

59. *Id.*

of the German, Heinrich Denzinger (1819-1883), who in 1854 assembled a thick book of quotations of conciliar and papal pronouncements. Denzinger's tome begins with a text from the second century, and the current, i.e., the fortieth, edition of the book brings the reader not only through Vatican II but also through a quarter century of the pontificate of John Paul II.<sup>60</sup> Denzinger's name remains on the book today, and names the theological method of using texts from the book (or in general of using snippets of texts) as undated, context-less nuggets to be adduced and rearranged while the adducing and rearranging theologian neither adds nor subtracts intellectual content. The irony is apparent that, in a tradition that understands the indispensable value of tradition, tradition has been supplanted by iteration and reiteration.

One way of elaborating the widely acknowledged defect in this method of doing theology is that it does not stop to ask what the drafters of the quoted language meant. Bernard Lonergan catches the problem in his observation that "one has only to peruse such a collection of conciliar and pontifical pronouncements as Denzinger's . . . to observe that each is a product of its place and time and that each meets the questions of the day for the people of the day."<sup>61</sup> The texts came into being thanks to authorities trying to meet the issues and solve the problems of a particular people, in a particular time and place; and what could be better than meeting the questions of the day for the people of the day? But the people who come later are different and they have questions of their own (though of course they may be very similar). If in meeting the questions of today someone would derive help from the learning of yesterday, he must *understand* what was said yesterday. Inasmuch as the texts handed down and selected afresh by us are answers to questions, then to understand them, we need to know the questions to which they are the answers. The Denzinger theologian does not have or make time for this inquiry; he reduces texts to authorless propositions in need of as much interpretation as the black squiggles on the pages of Euclid's *Elements*, and then boldly reissues them with a meaning of his own imposition, his signature supposedly nowhere there (except in the invisible ink). It's not rocket science that we can *impose* whatever meaning we like on whatever texts we can adduce. But if we are not asking what the authors meant, if we are not looking for the intelligence communicated through those words, there is no good reason to look at those words rather than other words (or any words at all). In any event, by failing to look for the intelligence (or lack thereof) in what was

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60. HENRICI DENZINGER, ENCHIRIDION SYMBOLORUM DEFINITIONUM ET DECLARATIONUM DE REBUS FIDEI ET MORUM (Helmut Hoping & Peter Hünermann eds., 40th ed. 2005).

61. BERNARD J.F. LONERGAN, METHOD IN THEOLOGY 296 (1972).

written down, the Denzinger theologian has cut himself loose from the possibility of learning.

The de-authoring error that I have just been describing is compounded by another that is related: The Denzinger theologian forgets what Denzinger himself knew, to wit, that a selection was made among available documents. Denzinger prefaced his book of nuggets with methodological notes on the "*selectio documentorum*" and the "*valor documentorum*"; he knew that he had made selections and he judged that the documents had various strengths. But for those who use Denzinger's volume the way one would use the Periodic Table of the Elements, the universe is closed and all its members are created equally elemental. No one quite defends this method of theology, of course, but those eager to shore up, or sew up, the faith tradition and community are apt to slide in this direction, concretizing a canon that is and should be the tradition's work in progress. *Should be*, because the people whose tradition it is have fresh questions (else they are moribund or dead). I am fond of quoting David Tracy's observation that "when literate cultures are in crisis, the crisis is most evident in the question of what they do with their exemplary written texts."<sup>62</sup> We cannot stop history "by the rules," but that hasn't stopped people's trying.<sup>63</sup>

With this in mind, I wish to return to what we do in law, and ask how much it resembles what the Denzinger theologian is up to. Though my answer will provide what I take to be a good and sufficient reason for agreeing with Smith that we should read texts in law for their semantic intentions, it is, as I say, a reason that Professor Smith will probably not accept. To the extent that the true locus of law lies in an overarching reality, signification about the natural law and the means of its achievement will not measure up.

In law we turn to texts alright, but there is no universal-Denzinger to tempt us. No one has done the work of selection for us. There remains the seduction to suppose that the list of texts that can be consulted is capped, but that temptation, strong though it be, usually gets resisted when push comes to shove. Edmund P. Morgan's classic 1944 statement of the judge's responsibility vis-à-vis the law brings into bold relief the openness of the inquiry and its source in the responsibility of the judge to be lawful:

In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of

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62. DAVID TRACY, PLURALITY AND AMBIGUITY 11 (1987).

63. See Patrick McKinley Brennan, *Political Liberalism's Tertium Quiddity: Neutral "Public Reason,"* 43 AM. J. JURIS. 239, 249-50 (1998) (reviewing MICHAEL J. WHITE, PARTISAN OR NEUTRAL: THE FUTILITY OF PUBLIC POLITICAL THEORY (1997)).

both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present. He may reach a conclusion in accord with the overwhelming weight of available data or against it. . . . In all this he is entitled to the assistance of the parties and their counsel, for he is acting for the sole purpose of reaching a proper solution of their controversy. But the parties do no more than to assist; they control no part of the process.<sup>64</sup>

By the time he renders judgment, the judge must be able to say what the law is, and the process available to him allows him to "make the assumption a fact."<sup>65</sup> This does not commit one to judicial infallibility; it simply acknowledges that the court cannot stop trying to get it right, even as further reflection reveals that the court failed in the last case. The question of constitutionality was not briefed in *Erie Railroad Co. v. Tomkins*,<sup>66</sup> but overrule *Swift v. Tyson* the Court did nonetheless, in part on the basis of "the more recent research of a competent scholar" (which, of course, would before too long be discredited by still newer learning).<sup>67</sup> Stare decisis is the sound judicial practice of standing on what can and should be stood on, not a supposed natural-law mandate for entrenching error or overruling all decisions that were originally erroneous. It is instructive that no Supreme Court Justice has taken the position that initially incorrect constitutional precedent should no matter what be overruled.<sup>68</sup> What will be "right" may have altered, and so too the judicial office. What judges *do* in the name of the law, as opposed to what they *say* in that name, shapes itself to the life in which the natural law is to be implemented.<sup>69</sup>

I began by speaking of the judge's relationship to the law because we think we know more or less what it is in his office to do (or forbear to do). But the judge's office or role is what it is not because of a Platonic Form, but because of its more or less defined place in an overall effort in which he has his particular part to play. A practitioner of law looking to make a statement of law, as advocate before bench or as counselor to client, will look to all the available evidence. What that evidence is, he

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64. Edmund M. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 270-71 (1944) (footnote omitted).

65. *Id.* at 271.

66. 304 U.S. 64 (1938).

67. *Id.* at 72; see also Richard H. Fallon, Jr. et al., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 634-35 (5th ed. 2003).

68. RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 113 (2001).

69. See Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 159 (1928).

will have to determine for himself, though the tradition in whose overall community effort he plays a part will help. As I argued above, unless it be a dead tradition (which, again, is no tradition at all), it will have built into its core methods for meeting the questions of the day for the people of the day, and this will include the possibility of self-correction and growth (and insulation against invasion by the domestic barbarian). In a word, it will do what raises the probabilities that the wheel of law and the body politic will not only turn, but also roll along.<sup>70</sup> That is how the natural law gets implemented, the human good constructed in history.

Guidance for making selections and then determining which texts are to be perused, and which are to be scanned or rusticated, is derived from the inquiring mind's goal. *Ex hypothesi* he is aiming to make a statement than can be enforced on behalf of the community and obeyed by the community's members. If the Talmudically-slouched soul seeking to make such a statement of law happens to be a judge, he is such because, as I have indicated, the community has created offices (of which his is one) and endued their holders with power to govern the community toward its and its members' goods and goals. As Aquinas has it, the judge is, *duplex servitus*, a twice-measured servant: measured first by the natural law as all people are, then also by the positive law of the community in virtue of his office. Though it would be a trespass upon the common good for him to usurp more authority than he has been given,<sup>71</sup> this fact does not settle how much authority he was, or should be, given (e.g., state court judges and federal court judges hold different powers—a fact systemically overlooked, by the way, by Ronald Dworkin). Whatever the particular parcellings out of office, however, in any human community you can conceive of, tradition remains the crucible of discovery of the natural law and the means of its implementation; as we saw in Part II, the discovery and implementation of the natural take place *within the life of a community*. The community that is the state derives its legitimacy, as all communities derive their legitimacy, from being basically committed to seeking and implementing the good. In looking to evidence from the past, the legal community's judge will be looking for what intelligence about human living can be found there, looking for what minds who confronted similar problems and goals in the past passed along and down in their writings. Some of these go to a community's particular and unique emphases and goals, its *determinationes*; others give straightforward temporal effect to perennial principles of the natural law.

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70. On the place of method in law, see Patrick McKinley Brennan, *Law and Who We Are Becoming*, 50 VILL. L. REV. 189, 199-201 (2005), and Patrick McKinley Brennan, *Realizing the Rule of Law in the Human Subject*, 43 B.C. L. REV. 227, 277-83 (2002).

71. See HITTINGER, *supra* note 18, at 100-03 (discussing Aquinas's position).

And *this* then, at last, is why I think Professor Smith is so right that the semantic intentions of the author just are the "legal meaning."<sup>72</sup> Texts are worthy of our attention as part of the project of guiding and structuring human living to the extent that they are the intelligible and intelligent communications of other persons engaged in the collective construction of the good. We look to the texts in law as the communication of intelligence about living, because intelligence (as a capacity) is what we have, and intelligence (as the product of the successful use of that capacity) is what we are after. Texts by unintelligent authors should be marginalized; those by witty souls should, wittily, be given pride of place. I cannot give you "nice specifications"<sup>73</sup> for how the tradition shifts priorities among texts, but I can submit that the justifying goal of letting the natural law enter assures that we must be looking to those texts for what intelligence they communicate. We could look to the texts for palindromes instead, but that would be no contribution to law; elite tile is no rule by which to live.

Now, the principal opposing position holds that instead of looking for the author's meaning through the text, we should turn to the text but then give it somebody else's—or nobody's?—meaning. This is what the Denzinger-theologian-turned-lawyer does: He proceeds to try to solve the problems of the day for the people of the day without looking for the intelligence in what has come down from the past. By substituting for the author's intent a "meaning" constructed from statistical probabilities of meaning (which is all that lexicons and grammars can record), he cuts himself off from the potential sources of transmitted wisdom. He might get lucky for a while, and indeed he probably will, because chances are high, as Professor Smith observes to a somewhat different purpose, that the speaker's meaning will coincide with the ordinary meaning.<sup>74</sup> But over the long run, the history that I read shows that the cultures that succeed writ large are the ones that succeed by writ small creating effective methods for cumulatively and progressively discovering and implementing the good. The trouble with identifying legal meaning with something other than the semantic intentions of the author or authors is *not* that doing so is incoherent; it's just that it loses the traction necessary for law, that is, its being calculated to pass on and correct intelligence, leading to the progressive and cumulative entrance of the natural law into human living. It becomes that "unintelligible restraint," a blunt intrusion upon intelligence's possible scope.

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72. SMITH, LAW'S QUANDARY, *supra* note 5, at 101-25.

73. VINING, *supra* note 14, at 75.

74. SMITH, LAW'S QUANDARY, *supra* note 5, at 145.

Given my agreement with Professor Smith on the identity of legal meaning and semantic intention, I should go on to ask whether I am saddled with what he refers to as "the problem of authors."<sup>75</sup> The apparent problem is that having concluded that the legal meaning of texts just is the semantic intentions of their authors, in order to follow the law we shall need to know *collective* semantic intentions. Here I shall just record that I agree with Smith's case for the *in principle* possibility of a legislative intention, and also with his estimation of the frequency with which it occurs.<sup>76</sup> A consequence of the large size of the population of our legislative branch makes getting to know the mind of the lawgiver difficult. But the difficulties judges and others encounter in getting to know the lawgivers' semantic intentions do not properly operate to supplant the lawgiver's meaning with someone else's, at least not without sub silentio usurping the lawmaker's office. The difficulties of interpreting the Decrees of the Council of Trent are not thought, except by the Denzinger theologian, to dispense the interpreter from the job of grasping the meaning the hundreds of enactors intended in their enacting. To put this point as it concerns law in its strongest form: because law just is an ordinance of reason, law's only locus is reason—first that of the lawmaker(s), then that of one(s) ruled (both citizens and judge). It is only in a very extended sense of the term, that is, *per similitudinem*,<sup>77</sup> that law can be said to be "'in' . . . the law books, the red [traffic] light, [and] the physical flow of traffic itself."<sup>78</sup> This just is the consequence of law's being an ordinance of reason—hence the need to serve wittily, in the tangle of our minds.

The difficulties of living by this fact about law's being in reason move Professor Smith to look for that hypothetical author whose semantic intentions are easier to get a handle on, and, like the imaginary friends we may have had as children, they are indeed very approachable; their problem is that they're pushovers. In the alternative, we can hypothesize a Hercules, but he turns out to be too superior to be reachable, and is therefore utterly unhelpful. On good and sufficient ground Professor Smith declares the search for an adequate hypothetical author a failure, whereupon he "revisits" the classical account to see whether it might offer help. Here Professor Smith concludes that *if* (but only if) we could be like our forebears and *believe* in the eternal law of God, we might be on our way to getting out of the quandary in which he finds us.<sup>79</sup> But by way of conclusion I should like to suggest that the problem is not so

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75. *Id.* at 126-53.

76. *Id.* at 135-43.

77. AQUINAS, *supra* note 27, at Pt. I-II, Q. 91, Art. 3.

78. HITTINGER, *supra* note 18, at 96.

79. SMITH, LAW'S QUANDARY, *supra* note 5, at 152, 174-75.



much a failure of belief, as it is a failure of intelligence, a failure to be witty.

#### IV. LIVING THE CORRELATION

Let me begin to move toward a conclusion by asserting again that God does not implement the natural law, at least as "natural law" is understood in the classical tradition: It falls to us freely to implement the law God has promulgated in us. Jacques Maritain makes the point sharply:

Men know [the natural law] with greater or less difficulty, and in different degrees, running the risk of error here as elsewhere. . . . That every sort of error and deviation is possible in the determination of these things merely proves that our sight is weak and that innumerable accidents can corrupt our judgment. . . . All this proves nothing against natural law, any more than a mistake in addition proves anything against arithmetic. . . .<sup>80</sup>

If before reading what I have written here you were not already disposed to affirm the existence of the natural law governing us humans, and therefore the obligation to use practical reason to continue to discover and implement that law, nothing I could say in this compass would change your mind. The point I wish to highlight, however, is that, alike for those affirming the natural law and those vilifying the same, failure to implement the natural and thus become the good that we can be is a sadness for which there is no terrestrial balm, an insight given memorable-to-the-point-of-haunting expression by Pascal:

Man is a mere reed, the weakest thing in nature; but he is a thinking reed. The entire universe need not arm itself to crush him; a vapour, a drop of water, is sufficient to cause his death. But if the universe were to crush him, man would still be nobler than his destroyer, because he knows that he dies, and also the advantage that the universe has over him; but the universe knows nothing of this.<sup>81</sup>

If man chooses to let the universe or that "trend . . . in recent centuries called democracy"<sup>82</sup> get the better of him, by doing what is against the natural law, he has no one but himself to blame. God may forgive him, but that would do nothing to undo the ontic harm done. One is either instantiating the good or one is not, and that is the end of the matter so

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80. JACQUES MARITAIN, *THE RIGHTS OF MAN AND NATURAL LAW* 62-63 (Doris C. Anson trans., Charles Scribner's Sons 1949).

81. BLAISE PASCAL, *PENSÉES* 110 (Louis Lafuma ed., John Warrington trans., J.M. Dent & Sons Ltd. 1960) (1670).

82. ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 9 (Amy Gutmann ed., 1997).

far as this life is concerned. Loving creator, redeemer, and sanctifier that He is, God did not promulgate the natural law so that we might then discover the higher law of democracy on which to impale ourselves.

Still, nothing in the classical position entails that one participate only in a legal regime that fully conforms to that natural law. *Sed contra*. The natural law is never fully known, therefore never fully implemented; it remains Flannery O'Connor's good "under construction"<sup>83</sup> in each individual and in every society. But, because individuals need society and thus political authority to begin to reach what the natural law commands, it follows that obedience to a particular government's authority will ordinarily be a person's first instance of obedience to law. Thomas More for a time subordinated himself to the statutes of the Carthusian Order and later to the laws of England; it was to the natural law directly that More conformed when the authorities acting in the name of the "law" of England (that was in truth no genuine law at all) left him no honest alternative. More, as you will recall, advised against chopping down all the laws, imperfect though he realized they were; this because he knew them to constitute the matrix in which lay most people's opportunities to live decent and worthy lives. Most of the time our obligations are to obey the law, and to contribute to its betterment as our office—judge, citizen, legislator, or even law professor—allows.

Law, though, is never the whole of the human picture: it operates in a complex dialectic with the larger culture. "'Culture' broadly understood is the world that people in a given society make by what they do and why they do it. . . . 'Culture' . . . reflects and is shaped by people's understandings of meaning . . . value,"<sup>84</sup> and what is *real*. Law's *Quandary* confronts a world in which lawyers and practitioners continue to talk a talk that the culture denies, at least in large part. Thus, another observation of Cardinal George's is material: "Law contributes massively to the formation of culture; culture influences and shapes law. Inescapably, inevitably, law and culture stand in a mutually . . . reinforcing relationship."<sup>85</sup> In the world Professor Smith has illuminated for us, the culture undermines the possibility of law. But the path that Professor Smith shies away from, and thus declines to irradiate, is that law, to the extent that we can and do continue to *do* it basically right, demonstrates to our society that the entrance of the natural law is possible. The fact proves the possibility; the fact does not leave us perplexed. I do not deny, indeed I agree that we must insist, that the

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83. O'CONNOR, *supra* note 19, reprinted in FLANNERY O'CONNOR: COLLECTED WORKS 830 (Sally Fitzgerald ed., 1988).

84. Francis Cardinal George, *Law and Culture*, 1 AVE MARIA L. REV. 1, 2-3 (2003) (footnote omitted).

85. *Id.* at 9.

current incongruence between our theories and our practice creates societal problems, including some bad laws and their consequences. But I should also insist that our philosophies are not the final measure of our performance. The question is what performance remains possible or exigent. The eternal law is unchanged; the natural law is unaltered by its desuetude. We can and must continue to implement the natural law despite the nonsense in the air. At the limit, we may have to follow More into silence, but More shows us how far distant that limit may lie.

Human practical reason giving effect to the natural law is a powerful tool. We have to overcome the tangles in our minds, to be sure; and frequently, if in fits and starts, "we" have. Mary Ann Glendon has observed of the common law that it was a working model of such reason, and particularly in its built-in capacity for self-correction and thus progressive and cumulative growth.<sup>86</sup> Professor Smith, in a part of *Law's Quandary* that I can only mention, resists characterizing what we do in law as an exercise in practical reason. I resist this resistance because *either* law is an exercise in practical reason *or* it is an utterly reasonless enterprise (because, obviously, it is not an exercise in pure theoretical reason). Practical reason discovering and implementing the natural law is the engine we have, and perfect carburetion is not to be expected. That, as Professor Smith observes in this vein, the common law method sometimes fails in its techniques and particular aspirations is no more an argument against its being an exercise in practical reason than those mistakes in addition are arguments against arithmetic.<sup>87</sup> We need to use practical reason better in order to make our specifically legal methods better, and certainly the wild growth in statute law, and in administrative statutes in particular, provides new challenges in terms of the particularizations of method that we need. We need a common law *method* for the age of statutes. There is real work to be done here, and its success is contingent upon our resisting the lure of enacted law whose democratic pedigree is said to dispense us from the obligation to implement the natural law. Anticipating anxiety in response to what I have just asserted, I repeat that the judge's usurping more authority than he has been given works a trespass upon the common good; it's just that, first, judges should be given what authority is necessary if the natural law is to be implemented in the here and now, and second, if the judge cannot reach a just judgment because he is properly *duplex servitus*, he must stand back rather than push ahead.

Particularly in his cautious introduction of Professor Vining's contributions, but also elsewhere in the book as well as in his *Believing*

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86. Mary Ann Glendon, *Knowledge Makes a Noisy Entrance: The Struggle for Self-Appropriation in Law*, 10 LONERGAN WORKSHOP 119, 126-29 (1994).

87. SMITH, *LAW'S QUANDARY*, *supra* note 5, at 92-96.

*Like A Lawyer*,<sup>88</sup> Professor Smith suggests that what is necessary if we would return to the classical position is that old standby, the "leap of faith." Faith is indeed, as Avery Cardinal Dulles has written, "*the* Christian word,"<sup>89</sup> and I am all for it—until, along with hope, it is no longer needed because charity reigns. But, speaking of hope, I hope that I shan't scandalize by concluding that we needn't vault any broad, ugly ditch to do law the way it should be done. There may now obtain a hobbling *rhetorical* gap; there may even obtain an *ontological* gap, for Professor Smith is right that most of the ontologies that prevail in the leading philosophy departments leave law without support or respect. There obtains, however, no *ontic* gap: God has created us with our human natures and God has legislated within us. Natural law is naturally knowable, and practical reason is ours with which both to discover and implement the natural law. That, at least, is the classical position, and I'm sticking to it, though it should be added that frequently, for purposes of persuading people of it today, a faithful translation from the traditional terms will be necessary.<sup>90</sup> There is only one way to serve God and neighbor, and that is wittily, in the tangle of our minds.

This brings me to a final point. In answering the question about suit against an unconsenting state, our Supreme Court eschewed a Denzinger jurisprudence in favor of attention to history, practice, precedent, the structure of the Constitution, and, yes, to text itself.<sup>91</sup> It was through the use of this sound procedure that, as I mentioned at the outset, the Court reached the dubious conclusion that the fifty states enjoy "sovereign dignity." Sovereignty and its cognates are Protean enough that they perhaps have benign meanings, but history shows that most deployments of sovereignty tend to stage an usurpation somewhere or other; the one on whose behalf sovereignty is claimed is freed thereby from the

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88. Steven D. Smith, *Believing Like a Lawyer*, 40 B.C. L. REV. 1041 (1999).

89. AVERY DULLES, *THE ASSURANCE OF THINGS HOPED FOR* 3 (1994).

90. One additional point merits inclusion here. Some natural lawyers, such as the great Jesuit Francisco Suarez (1548-1617), have held that knowledge of the legislative pedigree is necessary for the natural law to have the force of law. This presented no problem of enforcement for Suarez, because he was of the view that the *signum* of the divine legislator was fully evident in the promulgated law. The classical position of Thomas, however, is that it is sufficient that the recipient of the natural law be able to know the difference between moral good and evil, that is, that one is legislated to be done and pursued and the other avoided, and then to move on toward particulars and the prudent application of the natural law thereto. Thomas certainly thinks that we should be able to reason from these facts about good and evil to the divine legislator, but for Thomas it is not necessary for the agent to know the ultimate legislative point of origin. On Suarez, see HITTINGER, *supra* note 18, at 51-57, and JOHN E. COONS & PATRICK M. BRENNAN, *BY NATURE EQUAL: THE ANATOMY OF A WESTERN INSIGHT* 129-32 (1999).

91. See *Alden v. Maine*, 527 U.S. 706, 760 (1999).

obligation to implement the natural law.<sup>92</sup> Law is not text, and law of human creation is not sovereign. The preeminent service of Steven Smith's *Law's Quandary*, in my judgment, is its humbling if oblique suggestion to those working in mainstream Anglo-American jurisprudence that law of our making is the better the more it respects the true sovereign's legislation. Our work in the law is always the non-sovereign work of serving God wittily, in the tangle of our minds. We owe Professor Smith a great debt of gratitude for helping us untangle our minds a turn or two; the rest is up to us, wittily. In the words of More with which he follows up those with which I began: "Our natural business lies in escaping – so let's get home and study this Bill."<sup>93</sup>

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92. Jean Bodin often is identified as proposing a sovereign unlimited by even natural law or the law of God; for a correction of this misreading of Bodin, see KENNETH PENNINGTON, *THE PRINCE AND THE LAW, 1200-1600*, at 278 (1993).

93. BOLT, *supra* note 2, at 74.