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## Locating Authority in Law, and Avoiding the Authoritarianism of Textualism

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## ESSAY

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# LOCATING AUTHORITY IN LAW, AND AVOIDING THE AUTHORITARIANISM OF "TEXTUALISM"

*Patrick McKinley Brennan\**

### INTRODUCTION

What is the locus of authority in what we do in the name of law? This question, it should be apparent, is both circumscribed and expansive. From the angle of circumscription, the question postulates (1) "authority" (2) as an isolable element (3) in a practice in which (4) "we" are engaged (5) "in the name of law." The angle that highlights the "we" forebodes the expansion. After all, in order to locate authority's place in what we do in the name of law, we must say who "we" *are*. What could be easier—or less possible? "'Know thyself,' we hear suggested for our own good. [Yet w]e hardly know ourselves."<sup>1</sup>

Our resistance to self-knowledge has no doubt many causes, but among the legally orthodox, the asymptotic elimination of the human subject is virtually axiomatic. The orthodox would vouchsafe law's objectivity exactly by denying or minifying the subject's appearance in our legal undertakings. As one critic of the orthodoxy explains:

Sometimes it seems as if there is only one story in American legal thought and only one problem. The story is the story of formalism

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1 JOSEPH VINING, FROM NEWTON'S SLEEP 344 (1995).

and the problem is the problem of the subject. The story of formalism is that it never deals with the problem of the subject. The problem of the subject is that it's never been part of the story.<sup>2</sup>

The heterodoxy I wish to develop and defend here takes the human subject as a (proximate) starting point—the font of law and authority to live by.<sup>3</sup>

This competing theory observes that both the possibility and exigence of law—and the authority that alone makes law possible—issue from our subjectivity. Force and violence reach us from without, and they do so arbitrarily and with no regard for who we are. We become lawful, however, from the inside out, if we choose to do so at all. This is because—or, so I shall argue—we subjects are normatively oriented, though not determined, to the real and the good. We humans are not mere objects, nor does the normative order arrest us from without in episodes of “now for something totally different.” But before we advert to or thematize the fact, the fact is that we are ordered out of ourselves, first, to discover what is (the real) and, second, to discover and then realize the valuable that might yet be (the good). Because this normativity is indefeasibly ours (as long as our rational capacities shall last), all additional or subsequent normative claims—including those made “in the name of the law”—must meet its anterior and concomitant demands. Which is why we can say, with Joseph Vining: “The question what the law ‘is’ is not so very different from the question what we ‘are.’”<sup>4</sup>

The jurisprudential mandarins who keep orthodoxy afloat are at pains to keep this a secret. Ronald Dworkin's signal defection from humanity to Hercules is only the limit case; most mainstream legal theorists are content to prosecute the more modest quest for the rule of law that is *as much as possible* not a rule of men. We *are* all legal realists now, of course; “no 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>5</sup> However, at least from the moment the eager first realists spotted the camel in the vicinity of the tent of law, those concerned for law's rule have been trying to reconstruct law by constructing *theories* of how proto-realists can be made lawful.<sup>6</sup> Robert Bork's intentionalism, Justice Scalia's textualism, Bruce Ackerman's dualism, Owen Fiss' disciplining rules, Ronald Dworkin's integ-

2 Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1743 (1991).

3 “Proximate,” because human subjects *receive* the unrestricted desire that calls them out of themselves. See *infra* notes 94–95 and accompanying text.

4 VINING, *supra* note 1, at 128.

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

6 “Reconstruction” is Pierre Schlag's term. See Schlag, *supra* note 2, at 1661–62.

rity<sup>7</sup>—from the right and from the left they come bearing theoretical gifts designed to ensure law's rule in this world brought to us by Charles Darwin and Oliver Wendell Holmes, Jr. This is the world in which the idea that there is a norm that precedes what we do in the name of the law—a norm to which we are obligated freely to conform our living and the “positive law” by which we structure and govern it—has to compete with the idea that the only “laws” are those of physics.

Some students of law oppose the embarrassing surfeit of theoretical riches by denying that the game is worth the candle; the aspiration to a rule of law, they say, is simply misplaced, a holdover from prelapsarian naiveté. Paul Kahn, for instance, in a very profound study of what we do in the name of the law, concludes that “the rule of law may be our deepest political myth”<sup>8</sup> and recommends—citing the authority of Abraham Lincoln—that in place of law, we appeal first to charity.<sup>9</sup> Others counter the grand theories with more modest, more prosaic, more “pragmatic” aims and means. Judge Posner proposes legal pragmatism *simpliciter*,<sup>10</sup> and Cass Sunstein, to pick another example, advocates “incompletely theorized agreements.”<sup>11</sup>

This is all very interesting, to be sure—but the trouble, as I see it, is that the “grand theory vs. muddling through” false dilemma has largely blocked the human subject from view, and, along with him or her, the very possibility of authority and, therefore, of law. The result of this theory-driven occlusion of the potentially lawful subject is that what is put forward as law cannot but look “largely irrelevant to the self,”<sup>12</sup> no better than “an unintelligible restraint.”<sup>13</sup> What we adults do “need to be told”—or, rather, what we need to discover for ourselves—is what it is in us that generates authority and thus makes law possible, thereby preempting or displacing the authoritarian and the

7 Some of these are among the “grand theories” canvassed and criticized by DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY* 10–54, 97–139 (2002).

8 PAUL KAHN, *THE REIGN OF LAW*, at xi (1997).

9 *Id.* at 240 (“‘With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on . . . to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.’ In place of law, [Lincoln] appeals to charity . . .” (quoting Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in 1 *DOCUMENTS OF AMERICAN HISTORY* 442–43 (H. Commager ed., 1973))).

10 See, e.g., Richard A. Posner, *What Has Pragmatism to Offer Law?*, in *PRAGMATISM IN LAW AND SOCIETY* 29, 29–44 (Michael Brint & William Weaver eds., 1991).

11 See CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 35–61 (1996).

12 KEVIN M. CROTTY, *LAW'S INTERIOR* 90 (2001).

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

arbitrary. The availability of the authoritarian and of the arbitrary we can take for granted, but the possibility of law and of authority needs to be made out afresh, and this requires—or, so I am arguing—that we get to know ourselves.

What we do in the name of law has its externalia such as courthouses and capitols, codes and codicils, robes and ritual action, and these import “authority” of a sort. Furthermore, for reasons to which we shall come, we cannot do without externalia in law and the “authority” associated with them. But whereas no one mistakes robes and courthouses for the law itself, some do mistake texts for the law itself, thereby dissolving the possibility of genuine authority into one of its frequent fruits. Texts, like other artifacts of our creation, are not self-moving, self-justifying marionettes of law; texts do not rise of themselves to wield authority over us. A book of black marks the cover of which is embossed “Revised Statutes of the State of Utopia” or “Restatement (Seventh) of Everything” is an unlikely contributor to law; but if on the cover were etched “California” instead of “Utopia” or “Contracts” instead of “Everything,” we might—or we might not—have a different case, as anyone familiar with “unconstitutional” statutes and the “persuasive authority” of a Restatement knows. In figuring out what might make the difference in the latter case, what I am after is what in us is the root of law and of authority—in a phrase, *the inner experience of law*.<sup>14</sup>

On the account I shall develop, “the inner experience of law” includes the cognitional and volitional experiences of the legislator promulgating texts, of the judge interpreting these texts, and of the sheriff determining how to give coercive effect to judicial decisions bearing on the community; it also includes the experience of individual subjects understanding those rules and then receiving or rejecting them as guides to conduct. Underneath and uniting all these (and other) particular inner experiences of law, however, there is the primordial inner experience of law; anteceding all particular experiences of law, it is the condition of their possibility. I shall refer to it as the experience of *inner law*, what I referred to above as our normative orientation out of our interiority toward the real and the valuable. “Inner law” is my name for what Bernard Lonergan referred to as the criterion that precedes “the criteria of truth invented by philoso-

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14 DAVID M. GRANFIELD, *THE INNER EXPERIENCE OF LAW* 225–75 (1988).

phers"<sup>15</sup>; it is "the dynamic criterion of the further question immanent in intelligence itself."<sup>16</sup> Lonergan continues:

Name it what you please, alertness of mind, intellectual curiosity, the spirit of inquiry, active intelligence, the drive to know. Under any name, it remains the same and is, I trust, very familiar to you.

This primordial drive, then, is the pure question. It is prior to any insights, any concepts, any words; for insights, concepts, words, have to do with answers, and before we look for answers, we want them; such wanting is the pure question.<sup>17</sup>

Our texts, our decisions, and our actions are, I shall argue, contributions to law exactly inasmuch as they are governed by *inner law*,<sup>18</sup> it is (exactly) individual and collective obedience to inner law, I shall argue, that creates authority and law.

Although Lonergan was right to insist that, in general, what you *name* this primal criterion is secondary to acknowledging its hegemony, the project at hand will not tolerate such linguistic license. Positivists and others bent on an univocal definition of law will resist the usage according to which what is within us is "law," but this usage is virtually required when one acknowledges that our rational consciousness, our subjectivity, is normatively ordered toward the real and the good. Recognition of this primordial norm promulgated within our rational consciousness leads to the acknowledgment of its preeminent status as law, with all subsequent undertakings in the name of law somehow analogically and derivatively related to it. For us, law begins within, and, if we heed it, proceeds outward through authority that allows the creation of particular laws for humans to live by.

The project of tracing our communal lawfulness to authority and ultimately to inner law will upset the sensibilities of souls bent on finding law that is so objective as to be (almost) able to claim its own instances. But, getting to know ourselves, we just might discover that *inner law* provides the foundation, a rock from and on which we can

15 3 BERNARD J.F. LONERGAN, *INSIGHT* (5th ed. 1992), in *COLLECTED WORKS OF BERNARD LONERGAN* 1, 247 (Frederick E. Crowe & Robert M. Doran eds., Univ. of Toronto Press 1992).

16 *Id.*

17 *Id.* at 33.

18 For additional development of this normative anthropology and its significance for law and legal systems, see Patrick McKinley Brennan, *Asking the Right Questions: Harnessing the Insights of Bernard Lonergan for the Rule of Law*, 21 J.L. & RELIGION 1, 3 (2006) [hereinafter Brennan, *Harnessing*]; Patrick McKinley Brennan, *Realizing the Rule of Law in the Human Subject*, 43 B.C. L. REV. 227, 230–31 (2002) [hereinafter Brennan, *Rule of Law*].

build.<sup>19</sup> Our compliance with it can create authority, and authority can speak (positive) law to us as individuals and as community. Inner law is not a rock after the manner of a "rail that runs surety through our judgments,"<sup>20</sup> but it does promise to lead us, if we would choose to follow, to the real and the good. The authority that it makes possible is not forceful, but it is correlative to our dignity as free beings capable of choosing intelligence over violence. A rock that is the human spirit working itself out may not be what H.L.A. Hart's absolute absolutist had wanted, but it just may be what we need in order to assure authority, instead of authoritarianism, in what we do in the name of law.<sup>21</sup> "Is everyone to use force against everyone to convince everyone that force is beside the point?"<sup>22</sup>

### I. THE TEMPTING OF SCALIA

To recognize inner law for what it is means subordinating all else to it, and we should recognize right away that this subordination thwarts another familiar and forceful aspiration, the one Thomas Paine thought was satisfied in what the colonists were creating: "[I]n America, *the law is king*."<sup>23</sup> David Dudley Field was of the same mind: "The law is our only sovereign. We have enthroned it."<sup>24</sup> The aspiration to which Paine and Field gave famous American expression is to displace the modern personal sovereign—conjured variously and menacingly by Thomas Hobbes, Jean Bodin, Jean-Jacques Rousseau, and John Austin, among others—with a sovereign that just *is* human law. On the typically modern conception, the (personal) sovereign was to be above the law, possessed of absolute and unconstrained power.<sup>25</sup> On the view Paine and his progeny propound, by contrast, positive law is as high as it gets. The substitution of sovereign law for

19 The expression "rock on which one can build" is Lonergan's. See BERNARD J.F. LONERGAN, *METHOD IN THEOLOGY* 19 (1972); see also Thomas C. Kohler, *A Rock on Which One Can Build: Friendship, Solidarity, and the Notion of Authority*, in *CIVILIZING AUTHORITY* 99, 112–14 (Patrick McKinley Brennan ed., 2007) (noting that the "transcendental method" is the rock upon which one can build authority).

20 Martin Stone, *Focusing the Law: What Legal Interpretation Is Not*, in *LAW AND INTERPRETATION* 31, 57–60 (Andrei Marmor ed., 1995).

21 See Brennan, *Rule of Law*, *supra* note 18, at 239.

22 LONERGAN, *supra* note 15, at 655.

23 THOMAS PAINE, *COMMON SENSE* (1776), reprinted in *COMMON SENSE AND OTHER POLITICAL WRITINGS* 3, 32 (Nelson F. Adkins ed., 1953).

24 David Dudley Field, *Magnitude and Importance of Legal Science* (Sept. 21, 1859), in *1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD* 517, 530 (A.P. Sprague ed., New York, D. Appleton & Co. 1884).

25 See Patrick McKinley Brennan, *Against Sovereignty: A Cautionary Note on the Normative Power of the Actual*, 82 NOTRE DAME L. REV. 181, 204–08 (2006).

the unconstrained personal sovereign is modernity's hope to do better than Hobbes.<sup>26</sup> Hans Kelsen had something of the sort in mind,<sup>27</sup> and, for its part, I am afraid, even the *Compendium of the Social Doctrine of the Church* refers to "the principle of the 'rule of law,' in which the law is sovereign."<sup>28</sup> Closer to home, Justice Antonin Scalia, having made a profound genuflection to democracy, has been tireless in his privileging of positive law: "It is the law that governs [us]"<sup>29</sup>—and the reference is to law of human, not higher, creation.

Among the grand theorists named above, the Justice and his jurisprudence deserve our special attention, and this for at least these two reasons. First, unlike all the other grand theorists named above, Justice Scalia is sometimes in position to implement his theory in the name of the Constitution of the United States and without risk of being overruled by a higher court.<sup>30</sup> Second, the Justice is, I wish to suggest, putting forward what those observant of inner law must regard as a specially treacherous form of pseudo-law, a system of rules backed by a species of authoritarianism. Justice Scalia's well-known "just apply the rules of law" injunction, reinforced as it is by the common political bromides about the glories of democracy and the evils of "legislating from the bench," perhaps sounds banal or even commonsensical. Behind its presuppositions and modes of proceeding, however, are entailments that, I would suggest, cut the legs of law out from under it by removing all possible sources of authority.

Justice Scalia's announced twin aims have been to make what we do in the name of law as much as possible (1) *a system of rules contained in, or constructed from,* (2) *a closed universe of texts.* Textualism is the

26 On the move to make law the sovereign, see W.J. STANKIEWICZ, ASPECTS OF POLITICAL THEORY 62 (1976).

27 Hans Kelsen, *The Pure Theory of Law*, 50 L.Q. REV. 482 (1934).

28 PONTIFICAL COUNCIL FOR JUSTICE & PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH ¶ 408 (2004) (quoting POPE JOHN PAUL II, CENTESIMUS ANNUS, reprinted in 21 ORIGINS 1, 17 (1991)). The quotation, which itself is wholly a quotation from the encyclical *Centesimus Annus*, is from the English typical edition prepared and published in Rome. See POPE JOHN PAUL II, CENTESIMUS ANNUS ¶ 44 (1991), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/index.htm](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/index.htm) (follow the "English" hyperlink below "Centesimus Annus"). The official Latin text of *Centesimus Annus*, though it does indulge in a personification of law, hardly seems to bear the English translation given it by the drafters of the *Compendium*: "leges potissimum dominantur." IOANNES PAULUS II, CENTESIMUS ANNUS ¶ 44 (1991), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/index.htm](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/index.htm) (follow the "Latin" hyperlink below "Centesimus Annus").

29 Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 17 (Amy Gutmann ed., 1997).

30 See FARBER & SHERRY, *supra* note 7, at 29.



technical name for the second aim, and its boast, according to Justice Scalia, is that, by treating as the law itself the "objectified intent" lodged in the text the lawgiver promulgated, it delivers "a government of laws and not of men."<sup>31</sup>

We look for a sort of "objectified" intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*. . . . [T]he reason we adopt this objectified version is, I think, that it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. . . . Men may intend what they will; but it is only the laws that they enact which bind us.<sup>32</sup>

Texts, rather than the lawgivers' meaning, are the law, and authority (or the lack thereof) is hardly tarried over. What the lawgiver, a person (either individual or corporate), "meant" has been suppressed to make way for a text, what the lawgiver "promulgated." The limitation of the judicial role to giving coercive effect to text delivered by the government printing office is a strategy that Justice Scalia took the occasion of a lecture at the Gregorian University in Rome to defend in particularly poignant terms:

[I]t is dogmatic democracy . . . . [M]y only authority as a judge to prevent the state from doing what may be bad things is the authority that the majority has given to the courts. . . .

To say, "Ah, but it is contrary to the natural law" is simply to say that you set yourself above the democratic state and presume to decide what is good and bad in place of the majority of the people. I do not accept that as a proper function. . . .

. . . .  
. . . I have been appointed to apply the Constitution and positive law. God applies the natural law.<sup>33</sup>

Here, "authority" amounts to a democratically conferred license; the Justice's "authority" is to function, as much as possible, as something

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31 Scalia, *supra* note 29, at 25.

32 *Id.* at 17. Recognizing that not everything that we might seek to cover with law is reducible to rules, Scalia states: "Only by announcing rules do we hedge ourselves in." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989). "All I urge is that [totality of the circumstances tests and balancing modes of analysis] be avoided where possible; that the *Rule of Law*, the law of *rules*, be extended as far as the nature of the question allows . . . ." *Id.* at 1187. This concession, such as it is, leaves the system, or the aspiration thereto, intact.

33 Antonin Scalia, *Of Democracy, Morality and the Majority*, Address at Gregorian University (May 2, 1996), in 26 ORIGINS 81, 88–89 (1996).

of a conduit for democratically generated texts and the rules they contain.

To listen to Scalia describe the features of what he proposes, of textualism and "dogmatic democracy," one might suppose that he is doing little more than reporting what is largely beyond dispute. Just beneath the surface of the description, however, just beyond the modest "all I urge," is a breathtaking campaign drastically to shorten (what H. Jefferson Powell refers to as) the "list of legitimate modalities"<sup>34</sup> by which to approach the work of a federal judge and, with it, law in general.

Like it or not, however, the grand theory urged must contend with the unacknowledged fact that the Constitution simply does not fix the modalities of its own construction and implementation, nor, for that matter, does it define "the Judicial Power" that it undertakes to vest.<sup>35</sup> These points are too plain to merit argument here. Whatever its merits or demerits, textualism is one man's (or a group's) argument for a constitutional order of a certain kind. At the very least, then, Scalia's position should be acknowledged for what it is, "a proposal for radical reform."<sup>36</sup> The "distinguishing features" of Justice Scalia's jurisprudence are, in sum, that "(1) it is a system; (2) it is a system selected for plainly pragmatic reasons. It represents an intentional effort to diminish the role of discretion and personality in the judicial enterprise."<sup>37</sup>

That other Justices on the Court are perhaps up to more salacious mischief is no reason not to put Justice Scalia to the test. I shall say a word about the upside of Scalia's proposal at the end, but the untoward consequences and implications of constructing and inhabiting a system such as Scalia has in mind are my concern. According to the Justice, the people have spoken; from now on, the law rules *ex proprio vigore*—at least, that is, to the extent judges succeed in that all-important legal work of hemming themselves by interdicting the

34 H. JEFFERSON POWELL, *A COMMUNITY BUILT UPON WORDS* 209 (2002). Ralph Rossum, in his sympathetic *Antonin Scalia's Jurisprudence*, acknowledges that Scalia is attempting something of a revolution in order to provide "constraints" on would-be activist judges. See RALPH ROSSUM, *ANTONIN SCALIA'S JURISPRUDENCE* 203–07 (2006). What Rossum overlooks is how textualism itself depends on another species of activism. See *infra* notes 38–40; see also Brennan, *Rule of Law*, *supra* note 18, at 306–18 (describing the decisions and actions of a textualist-at-work).

35 See U.S. CONST. art. III, § 1.

36 POWELL, *supra* note 34, at 209.

37 George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1345 (1990). Justice Scalia does count some, but only some, of the costs of textualism (or originalism). See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852–65 (1989).

search for meaning. "Authority" amounts for Scalia simply to a democratically generated warrant, backed by the coercive power of the state, to behave in certain ways allegedly fixed (or nearly fixed) by "legal" texts. The axiomatic, asymptotic elimination of the human person by the interposition of a system of texts entails the elimination of any possible source of genuine authority that is worthy of respect and even intelligent obedience.

What has become of authority in the robust sense we usually think of it? That is, authority not as mere licensed power, but as that power that is worthy of respect and even intelligent obedience? The suggestion I made at the outset is that, like it or not, the axiomatic, asymptotic elimination of the human person by the interposition of a system of texts entails the elimination of any possible source of authority in law. Has Justice Scalia not sacrificed the authority of law on the alter of text and democracy?

A possible preemptive reply would be to say that the democratically enacted text, given effect by a constitutionally licensed judge, is itself just as much authority as one can hope for. Such a reply becomes more plausible the more one scratches the surface of Scalia's textualism and observes that the textualist judge, his claimed passivity notwithstanding, invents and justifies his own role (through the aforementioned campaign for radical reform), thus becoming a sort of *sub rosa* authority, at least to the extent that his plea for a "textualist" judiciary succeeds in winning judicial adherents. To the extent, moreover, the textualist succeeds in using law to create conditions in which justice has more of a chance of being done (than by, say, the judicial "activists" Scalia fingers), there is objective merit in what he is doing.<sup>38</sup> So far, so good.

This line of reply eventually founders, however, on the fact that, whatever the admirable consequences of his efforts, the textualist judge is engaged in a systematic campaign to eliminate the *problem* of authority in law by eliminating the *source* of authority. This he does by severing the link between, on the one hand, the meaning of texts human subjects create in the name of law and, on the other, the meaning those texts will have in the mind and hands of the judge giving them effect (and of the citizen receiving them and deciding what action to take). Notwithstanding his vigorous protestations that his role is virtually supine, the textualist does not so much conform to the meaning of the legal text as he does construct it—construct it, as

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38 And of course, sometimes when a whole lot is thought to be at stake, textualists shed the textualist commitment, as in the area of sovereignty and sovereign immunity. See Rossum, *supra* note 34, at 106-14.

he says, without regard to what the lawgiver meant. Not looking for the real meaning of the text ("what the lawgiver meant"), he supplies a meaning for "what the lawgiver promulgated."<sup>39</sup> The decisive point is that the successful textualist has decamped from a world in which texts come to him with a meaning to be mined to a world of his own creation, a world in which he supplies the legislator's texts with a meaning of his own construction. One might call this an act or appearance of authority—except that it is, in fact, authoritarian, for the simple reason that it amounts in the end to judicial *ipse dixit*. Yes, the textualist canvasses dictionaries and other sources, but can they provide anything other than schedules of probable—rather than real—meanings?<sup>40</sup>

The textualist judge turns out to be an "activist" of a rambunctious sort, but meanwhile the appearances (of his deference and passivity) are kept up. Persons are not allowed to appear—this in order to make text, as much as possible, the only appearance in law. The result is texts awaiting the assignment of meaning, authority in abeyance. Joseph Vining catches the underbelly of textualism and "dogmatic democracy," its ineluctable lack of authority:

There is always an enormous difficulty, an enormous struggle in law particularly, to recall and keep in mind that language is evidence of meaning, not meaning itself. The struggle comes from the thirst to know, for closure, that can always be slaked for the moment by illusion, but at a cost and often a terrible cost. The difficulty, the struggle, is the difficulty of listening, and it is a person one listens to—only a person, whom one approaches in good faith, which includes faith that there is a person to be heard. Axiomatic elimination of the person, at least from conscious presence in the reasoning mind, is a way of cutting short the struggle, stopping the work of listening. It is precisely the elimination of the person that permits one to think of rules not as linguistic evidence but as having a real existence of their own. . . .

So there is always the temptation in law to approach a statute as if its words had meanings in themselves and by themselves—the authoritarianism sometimes shown by those devoted to maintaining the supremacy of democratic politics and legislative authority. . . .

. . . But over the long run lawyers do not succumb. They pull themselves away from the common temptation. Something that has

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<sup>39</sup> The irony of the creativity of the textualist's work is explored in Brennan, *Rule of Law*, *supra* note 18, at 305–18, through the example of Justice Scalia's opinion in *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994).

<sup>40</sup> See Brennan, *Rule of Law*, *supra* note 18, at 316–17.

authority pulls you into the spirit of it. Without spirit there can be no authority. Without authority there is no law.<sup>41</sup>

The trouble with a system such as Scalia's, so Vining suggests, is that it does what it can to hide—and thus to leave unregulated—the potential human sources of authority, thereby becoming authoritarian in the name of “dogmatic democracy.” One might be tempted to reply that the lawgiver's texts really do carry authority lodged within themselves and that my fear for authority's absence is unfounded. But if black marks on white pages carry authority in themselves, then perhaps too the etchings on rocks caused by centuries of random rubbings and collisions? And the configurations of the clouds blowing by, and of sticks and twigs washed up on the sea's shore?

I submit that authority in law requires the presence and appearance of persons, specifically, human subjects living out their orientation to the real and the valuable. Though inevitably present in the legal world Justice Scalia confronts, these human sources of authority are deliberately eclipsed and law's claim to bind is loosed to the extent the eclipse succeeds. In developing this thesis, I shall put particular emphasis on the work of Joseph Vining, whom Steven Smith describes as “one of the most provocative but elusive legal thinkers of our time.”<sup>42</sup> Whether the approach to authority can now be other than oblique remains to be seen.

## II. DIAGNOSING *DENZINGER* THEOLOGIE IN LAW?

“Over the long run lawyers do not succumb,” Vining assures us.<sup>43</sup> But Scalia succumbs, and invites—and sometimes forces—the rest of us to come along. Gordon Wood has opined that “[t]he real source of the judicial problem that troubles Justice Scalia lies in our demystification of the law, which is an aspect of the general demystification of all authority that has taken place in the twentieth century.”<sup>44</sup> Wood suggests that perhaps we should “remystify some of what lawyers and judges do”<sup>45</sup>—a suggestion Scalia would counter with the unexceptionable observation that the bell announcing legal realism cannot be unrung.<sup>46</sup> There is another alternative, however, one that only

41 Vining, *supra* note 1, at 239–41.

42 STEVEN SMITH, *LAW'S QUANDARY* 170 (2004).

43 Vining, *supra* note 1, at 241.

44 Gordon S. Wood, *Comment*, in *A MATTER OF INTERPRETATION*, *supra* note 29, at 49, 63.

45 *Id.*

46 As this provocative admission confirms: “That is why, by the way, I never thought Oliver Wendell Holmes and the legal realists did us a favor by pointing out that all these legal fictions were fictions: Those judges wise enough to be trusted with

requires that we get to know ourselves—not according to the reductive descriptions offered by the realists, but as we really are. Rather than “remystify” law, we might follow Joseph Vining and observe that what we *do* in law, notwithstanding what we sometimes say about it, is everywhere full of the traces of genuine authority, the legal manifestation of human spirit working itself out<sup>47</sup>—or, in my idiom, subjects obedient to inner law. To observe and heed these appearances of authority is always a struggle, one that Scalia rejects with his frank and final preference for a system of legal rules.

Why, we might ask, does Justice Scalia succumb? Why is Antonin Scalia, of all people, engaged in an “intentional effort” to construct as closed a system of law as possible? “Dogmatic democracy” and textualism do not make the only response to legal realism, and some of the other possible responses, which mount a more frontal assault than Vining’s invitation to attend to what we in fact do that breathes authority in law, appear quite in line with the Catholic tradition that Scalia calls his own.<sup>48</sup> Scalia’s Catholicity and Catholic erudition are *concessa* on all sides. Justice Scalia, without engaging in a pseudo-remystification project, indulging a single woolly idea, or even struggling to follow Vining’s charting of authority’s pulse in the breadth and depth of our legal practice, could take his stand with St. Thomas Aquinas and say, contra textualism and “dogmatic democracy,” that an unjust law is no law at all (but instead a perversion of reason).<sup>49</sup> Antonin Scalia, of all people, knows better than that “God applies the natural law.” He also knows that one can travel a long way with “legal positivism” without denying, as textualism welded to “dogmatic

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the secret already knew it.” Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 589 (1990).

47 VINING, *supra* note 1, at 241.

48 Cf. William J. Stuntz, *Christian Legal Theory*, 116 HARV. L. REV. 1707, 1725 (2003) (book review) (describing Scalia as an “observant Catholic” who believes that “any earthly government [including a democratic government] is ‘the minister of God, a revenger to execute wrath’” (quoting Antonin Scalia, *God’s Justice and Ours*, FIRST THINGS, May 2002, at 17, 18–19)). The gaping exception is his disagreement with the position taken on capital punishment in the encyclical letter by POPE JOHN PAUL II, EVANGELIUM VITAE [THE GOSPEL OF LIFE], reprinted in 24 ORIGINS 689, 693–94 (1995) and then in the CATECHISM OF THE CATHOLIC CHURCH §§ 2258–2267 (2d ed. 2000). See, e.g., Tom Levinson, *Confrontation, Fidelity, Transformation: The “Fundamentalist” Judicial Persona of Justice Antonin Scalia*, 26 PACE L. REV. 445, 476 & nn.204–09 (2006) (“Pope John Paul II’s encyclical *Evangelium Vitae*, in Scalia’s view, is wrong, and misrepresents the weight of Catholic tradition and teaching on the permissibility of the death penalty.” (citing Scalia, *supra*, at 17, 19–21)).

49 See THOMAS AQUINAS, SUMMA THEOLOGIAE I–II, 9.93, a. 3.

democracy" does, that positive law cannot violate the natural law without thereby losing *pro tanto* its capacity to bind as a legal norm.<sup>50</sup>

George Kannar's insightful study<sup>51</sup> of Justice Scalia's jurisprudence sheds light on this question, and, by doing so, contributes to an answer to our guiding question about the locus of authority in what we do in the name of law. Kannar's critical insight is that Scalia the Catholic was acculturated into a religio-theological world in which, when it comes to articulating what we believe in, or to stating the norms by which we are to live, "we" either do nothing or as little as possible—or, at least, we cause ourselves to appear to do nothing or as little as possible.<sup>52</sup> More formative of Scalia's legal mind than the "higher elements" of the Catholic legal tradition" is, according to Kannar, the approach to text and history that prevailed in those self-effacing religio-theological circles of Scalia's youth.<sup>53</sup> Kannar urges that "in understanding that experience, a page of the *Baltimore Catechism* may be worth a volume of Aquinas."<sup>54</sup> But even more helpful than a page of the *Baltimore Catechism*, I suggest, would be a page from the *Enchiridion Symbolorum et Definitionum et Declarationum de Rebus Fidei et Morum*,<sup>55</sup> the text that in many ways provides the background not only to the *Baltimore Catechism* but to much else that grew up in Catholic practice during the period before the 1950s and 1960s.

Although Catholics who knew the Church before the Second Vatican Ecumenical Council (1962–65) were plenty familiar with the idea that in the Church's magisterium there is "authority," paradoxically the magisterium and many of the Church's influential theologians minimized the need for or function of the voice of authority in the life of Catholics (which no doubt has something to do with why so many Catholics of that period sadly, and unnecessarily, see the Church as an authoritarian institution). The appearance sometimes created was

50 See John Finnis, *The Truth in Legal Positivism*, in *THE AUTONOMY OF LAW* 195, 202–03 (Robert P. George ed., 1996).

51 See Kannar, *supra* note 37, at 1313.

52 See *id.* at 1317.

53 See *id.* at 1311–12.

54 *Id.* at 1313. The *Baltimore Catechism* was prepared for religious instruction in the United States at the request of the bishops of the Third Plenary Council of Baltimore in 1884. It emerged first in 1891, and in its various editions and "numbers" (the higher the number, the more elaborated the presentation) structured most Catholic catechesis in the United States until it fell out of favor following the Second Vatican Council. See *THE HARPERCOLLINS ENCYCLOPEDIA OF CATHOLICISM* 129–31 (Richard P. McBrien ed., 1995).

55 HENRICUS DENZINGER, *ENCHIRIDION SYMBOLORUM ET DEFINITIONUM* (Wirceburgi, Sumptibus Stahelianis 1854).

one of the theologian or teaching-Church engaged in a kind of ventriloquism. The method is described by Bernard Lonergan:

What Karl Rahner refers to as *Denzingertheologie*, the late Pierre Charles of Louvain named Christian positivism. It conceived the function of the theologian to be that of a propagandist for church doctrines. He did his duty when he repeated, explained, defended just what had been said in church documents. He had no contribution of his own to make and so there could be no question of his possessing any autonomy in making it.<sup>56</sup>

This way of doing theology takes the epithet by which it is known from the *Enchiridion*, the book of quotations from papal and conciliar pronouncements originally edited by Heinrich Denzinger in 1854.<sup>57</sup> As the tome went through dozens of editions over a century and a half, Denzinger was succeeded by other editors of course, including the estimable theologian Karl Rahner,<sup>58</sup> but Denzinger's name remained and named a method of theology enabled by the handy book of quotations. The practitioner of *Denzingertheologie* proceeded by adducing proof-texts that were treated as timeless nuggets to be arranged and rearranged as fresh situations might invite. The Church, in reaching new formulations of these dogmatic truths, was neither adding nor subtracting, merely giving new expression. This is a complex phenomenon that is not readily summarized, but Kannar captures its thrust:

[The Catholic worldview sought] to reduce thought to "formulae" rather than to inspire a deeper reflection on ultimate historical or moral values, or on any abstract higher law. "The mode of theology was constant—a simultaneous linking and severing in the Scholastic *distinguo*. To know the terms was to know the thing, to solve the problem. So we learned, and used, a vast terminology," all in the service of a life-absorbing, habit-forming "urge to codify reality and capture it in rules." . . .

56 LONERGAN, *supra* note 19, at 330–31.

57 ENCHIRIDION SYMBOLORUM 822 (Henricus Denzinger & Adolphus Schönmetzer eds., Herder, 33d ed. 1965). In the thirty-third edition of the book, published in 1965, the quotations numbered 3999. By the time of the thirty-eighth edition in 1995, the number had risen to 4858, thanks to the inclusion of texts from the Second Vatican Council and subsequent pontificates. ENCHIRIDION SYMBOLORUM (Peter Hünermann ed., Edizione Dehoniane Bologna, edizione bilingue 1995).

58 ENCHIRIDION SYMBOLORUM (Henrici Denzinger & Carolus Rahner eds., Herder, 31st ed. 1957).



... Linguistic essentialism seems second-nature. To reject "policy" as a starting point is thus a rather easy thing to do.<sup>59</sup>

This was the world of a decadent scholasticism, in which "[t]he chair is still the chair of Moses, but it is occupied by scribes and Pharisees. Traditional doctrine is still taught, but it is no longer convincing. The religious order still reads out the rules, but one may doubt that the home fires are still burning."<sup>60</sup> In such a world, some people's ideal theologian comes to resemble "a parrot with nothing to do but repeat what has already been said."<sup>61</sup>

Such was the way of much of the Catholic world in the period immediately before the Second Vatican Council did its work. It is often said that the Council—the definitive event in the modern life of the Catholic Church—"made changes" in the Church. As regards discipline and practice, this is plainly true. At least as important, though, is the Council's work on change itself: "[t]he meaning of Vatican II was the acknowledgment of history."<sup>62</sup> The point Lonergan thus makes epigrammatically, and expounds and elaborates extensively elsewhere, is that at Vatican II the Church recognized her place in an *ongoing process* called history.<sup>63</sup> No longer pretending to live outside of time and above change, the Church reinstated reality—which includes the "deposit of faith" as well as the warp and woof of the change in which it is transmitted and received—as the object of concern and inquiry. Moving from what Lonergan called the "classicist" to the "historicist" operative stance, the Church recognized that her call to live in and by the truth entails the subordination of texts, even inspired texts, to fresh insights into those texts and the reality they concern.<sup>64</sup> In its *Dogmatic Constitution on Divine Revelation (Dei verbum)*, the Council explained that "There is a growth in insight into the realities and words that are being passed on."<sup>65</sup> Texts were thus freed to be the contingent and conditioned—if hugely important, and, in the

59 Kannar, *supra* note 37, at 1314–16 (quoting GARRY WILLS, *BARE RUINED CHOIRS* 16, 32 (1972)).

60 BERNARD J.F. LONERGAN, *Pope John's Intention*, reprinted in *A THIRD COLLECTION*, S.J., 224, 233 (Frederick Crowe ed., 1985).

61 LONERGAN, *supra* note 19, at 331.

62 Bernard Lonergan in Conversation (Mar. 28, 1980), in *CURIOSITY AT THE CENTER OF ONE'S LIFE* 414, 426 (J. Martin O'Hara ed., 1987) (quoting Lonergan).

63 See LONERGAN, *supra* note 19, at 331; BERNARD J.F. LONERGAN, *THE TRANSITION FROM A CLASSICIST WORLD-VIEW TO HISTORICAL-MINDEDNESS*, reprinted in *A SECOND COLLECTION* 1, 1–9 (William F.J. Ryan & Bernard J. Tyrell eds., 1974).

64 See LONERGAN, *supra* note 63, at 1–9.

65 *Dogmatic Constitution on Divine Revelation*, in *VATICAN COUNCIL II: THE CONCILIAR AND POST CONCILIAR DOCUMENTS* 750, 754 (Austin Flannery ed., 1975) (translating "crescit enim tam rerum quam verborum traditorum perceptio" from *CONSTITUTIO*

case of Scripture, inspired—helping to understand the reality that they are.

What *exactly* the Church acknowledged in this connection at Vatican II is much debated,<sup>66</sup> but present purposes do not require the taking of a stand on a disputed question. This much is beyond dispute: any acknowledgment of change—and there was some—makes inescapable the question of what assures or guarantees, if anything does, that such change will be in the right direction. In short, without timeless texts as a putative last word, the role of *authority* in both assuring authentic development and preventing false development is out in the open. Thus exposed, the question has been the occasion of a most vigorous debate over the last nearly half century. With respect to growth in insight into divine revelation, however, *Dei Verbum* already affirmed that those “in the episcopate,” to whom as a group in union with the Bishop of Rome the “deposit of faith” is entrusted, possess “the sure charism of truth” (“charisma veritatis certum”).<sup>67</sup> The question of authority can be debated, but there is no question but that the Church will not err in its interpretation of the deposit of faith. Thus the magisterium of the Church, on herself and on divine revelation.

When it comes to matters of state and statecraft, however, there can of course be no hope of landing anyone or any group possessed of “the sure charism of truth”—indeed, we justly fear and flee those who are cocksure of themselves as concerns the extent of our and our neighbors’ civil liberties. The Church’s divine assurance of not slipping into error assures us that the discussion will concern how—not whether—her teaching is certainly true as concerns divine revelation and what is contained in it. Architects of state, by contrast, lacking all assurance of access to the truth about human living, are remitted to what means of argument meet the test of our desire for the real and the valuable. To return to a proximate example, even textualism in constitutional interpretation is not self-certifying, a point even Justice Scalia would be quick to concede (preferring to end his regress with “dogmatic democracy”).<sup>68</sup> We are possessed of a Constitution and a tradition of its interpretation, but even for the legal force of these a case must be made out, minds persuaded.

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DOGMATICA DE DIVINA REVELATIONE (DEI VERBUM) 65 (Francisco Gil Hellín ed., 1993)).

<sup>66</sup> See, e.g., JOHN T. NOONAN, JR., A CHURCH THAT CAN AND CANNOT CHANGE 193–96 (2005).

<sup>67</sup> *Dogmatic Constitution on Divine Revelation*, *supra* note 65, at 754, 756.

<sup>68</sup> For a helpful survey of these issues, with a particular emphasis on Scalia’s normative argument for originalism/textualism, see RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 13–25 (2001).

In sum, the Church put away positivism by reminding us that what *matters* is living according to the truth, not according to formulations; Justice Scalia, by contrast, has staked his claim, and our collective living, on the legal analogue of *Denzingertheologie*. Can we blame him? Justice Scalia holds the view that statecraft has nothing to contribute to salvation.<sup>69</sup> No doubt anticipating an eschatological rectification of the whole grand mess, Scalia would commit us for now to the legal analogue of "Christian positivism." Leaving it to God to implement the natural law, Justice Scalia takes his rest on a system of texts. Again, "there is always the temptation in law to approach a statute as if its words had meanings in themselves and by themselves—the authoritarianism sometimes shown by those devoted to maintaining the supremacy of democratic politics and legislative authority."<sup>70</sup>

### III. RESISTING THE TEMPTATION—HOLDING OUT FOR AUTHORITY

"[W]hen literate cultures are in crisis, the crisis is most evident in the question of what they do with their exemplary written texts."<sup>71</sup> Justice Scalia's jurisprudence is an important phase in—not the whole of—legal history; "over the long run lawyers do not succumb."<sup>72</sup> But if they do not succumb—because they discern that nothing less than living in a way equal to our human dignity is at issue, still we have to ask exactly how it is that we can use texts in law without becoming authoritarian about them. If Scalia's solution to the problem of human living has the faults that we have been outlining, still we should not underestimate the problem to which textualism sometimes seems to be the solution. As Mary Ann Glendon has commented cryptically but clearly enough, "Our legal culture also explains why many friends of democratic and rule-of-law values have been driven to espouse what most civil lawyers would regard as excessively rigid forms of textualism."<sup>73</sup> Texts have the apparent advantage that they are there to be paid attention to—whereas everyone acknowledges that authority, even if it be real, is nothing anyone can touch or point toward.

Although there is occasionally serious discussion of it in the Anglo-American jurisprudential literature, authority remains an out-

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69 See Scalia, *supra* note 33, at 84.

70 VINING, *supra* note 1, at 240.

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

72 VINING, *supra* note 1, at 241.

73 Mary Ann Glendon, *Comment*, in A MATTER OF INTERPRETATION, *supra* note 29, at 95, 113.

lier in scholarship on law.<sup>74</sup> In fact, from the threshold, law's initiation rites disparage the conditions of authority, only half by accident. I refer to the "orientation" in which first-year law students are told—frequently by instructors reciting some out-of-date, photocopied text that has been provided by someone "in charge of orientation"—that our way of doing law, which will be the object of their attention for the next three years of their lives, affirms and depends upon "a hierarchy of authorities." But such stilted discourse rings hollow, and within days or at most weeks disorientation takes hold. No longer delayed by questions of "authority" and implausible "hierarchies" of the same, students are busy dividing the legal engine between "law" and the lawless, that is, between "black letter law" and "policy." Echoing too many professors and a profusion of "study guides," law's students have begun to imagine that law is what it is and speaks for itself; and policy, no one need be told, has always its advocates to advocate for it. This is only one man's report from the classroom, but he has heard the basis of it a thousand times: "Professor, are you making a policy argument or is this the black-letter law you're talking about?" As for Justice Scalia, it's just as simple as that—or, at least, one can always say that it's that simple.

But practicing lawyers, or at least the better ones, know better—know that texts are not as handy as the textualist would have you believe and that "policy" isn't an adequate description of the "what else" that goes into making law. Lawyers do not just find texts, black marks packed with rules ready to be dislodged and "applied," or dislodged and then massaged with policy until ripe to be given effect. Lawyers turn to texts alright, but as part of a process very different from the one outlined during "orientation." As Vining observes, "The texts to which they turn are selected and are old, necessarily from the past, requiring translation over time and between languages and places, year to year, decade to decade."<sup>75</sup> Denzinger left the texts in the Greek or Latin in which he found them, but he did do the work of selection for generations of Catholic theologians, many of whom forgot that there had been selecting<sup>76</sup>—this despite the introductory

74 On the possible elusiveness of authority in the modern world, see Steven D. Smith, *Hart's Onion: The Peeling Away of Legal Authority*, 16 S. CAL. INTERDISC. L.J. 97, 99 (2006).

75 VINING, *supra* note 1, at 263–64.

76 Mary Ann Hinsdale, to pick one example, describes Denzinger's *Enchiridion* as "a comprehensive catalogue of official pronouncements of popes and councils." Mary Ann Hinsdale, *Infinite Openness to the Infinite: Karl Rahner's Contribution to Modern Catholic Thought on the Child*, in *THE CHILD IN CHRISTIAN THOUGHT* 406, 414 n.29 (Marcia J. Bunge ed., 2001).

note "Selectio documentorum," and the additional introductory note on the authority of the included selections, "Valor documentorum." Lawyers lack a Denzinger. As practicing lawyers know, they—and judges too—must do their own selecting.

Denzinger limited his selections to papal and conciliar pronouncements, for reasons that find ready (though by no means uniform) resonance in the Catholic tradition. But what are the practicing lawyer's or the sitting judge's principles of exclusion and inclusion? It would seem to be at least in part a matter of "selection" that the Constitution of the United States rather than, say, the Articles of Confederation or the Code of Justinian, or a recipe on a shelf in Gary Lawson's kitchen<sup>77</sup> is to be consulted for what is to be law for us here and now—but on what principle? The constitutions and statutes of forgotten empires line the walls of the great museums and libraries, but are they to be selected? What of "foreign law"? What of the assertions by members of the current Supreme Court that foreign sources of law should—or should not—be consulted? "Overruling" is a fact of legal life the legitimacy of which no one denies; but even if *Plessy v. Ferguson*<sup>78</sup> is still "on the books"—or at least "in" the U.S. Reports—presumably it is no longer evidence of what is law for us. And so forth.

Resisting this destabilizing claim, an objector will object that "surely" what the legislature, "our legislature," gives us is "the law." "Certainly," it will be said, "what the U.S. Congress casts into the world, which is not vetoed, and survives judicial review, is law for us in America. Which is why," the etymologically-edified objector will continue, "we call it a *legislature*, not a consideration-bearer. Surely, at least within the confines of these United States, what the Congress launches is law, it being granted on all sides that in a cloistered monastery lodged on the coast of a remote island on the opposite side of the world, what the U.S. Congress issues by way of the Government Printing Office is no more 'the law' than is the wisdom of a Doonesbury cartoon that appears on the same day."

What this well-intentioned line of objection overlooks is how and why even here and now, the achievement of Congress' voting for, promulgating, and publishing some black marks, which then go unvetoed by the President and survive "judicial review," does not as such

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<sup>77</sup> See generally Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997) (describing the difference between interpreting the Constitution and the process of adjudication and the various ways each can be done).

<sup>78</sup> 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483, 494-95 (1954).

achieve law for us. As Vining says, "Statutes and regulations are only candidates for attention, not just in competition for enforcement resources, but in the very analysis of situations. This is to be observed historically from without. It is also experienced by lawyers, from within."<sup>79</sup> Vining softens the blow of this insight by exemplifying the point from another continent: "The piece of writing that emerges from Parliament is not the law. It is evidence of the law, which is used in the course of arriving at a statement of law."<sup>80</sup> He further notes that "[l]egislation is the arbitrary which we allow—but also limit. To make the point in its strongest form, it could be said legislation is lawless behavior, except that by a paradoxical trick we make legislative statements materials we use in determining what the law is."<sup>81</sup> To take a more proximate example from contemporary administrative law as it is practiced on this continent, the Administrative Procedure Act states that a "reviewing court shall . . . hold unlawful and set aside" agency action that fails any one of a number of statutorily defined criteria.<sup>82</sup> But when, in 2002, it was presented with an argument that it must set aside an agency action that it had found unlawful, the United States Court of Appeals for the D.C. Circuit said, per Judge Silberman, that it "is simply not the law" that it *must* set aside the unlawful agency action;<sup>83</sup> and for this proposition of discretion to decide whether to set aside the unlawful agency action, Judge Silberman cited earlier precedent of the same court decided in 1993<sup>84</sup> (while ignoring contrary precedent decided in 1994<sup>85</sup>). To say what the law is requires taking all of this—what is said or not said, what is done or not done—into consideration.

To put the point more broadly, the possibility of the executive veto—which invites the possibility of the supermajority—and the possibility of judicial invalidation on review or on collateral attack—are but incidents of legislative texts not being law *ex proprio vigore*. With exceptions that prove the rule, we do not give effect *as law* to what we cannot or will not say is worthy of being acted upon intelligently. No lawyer arguing to a court about the correct disposition of agency

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79 Vining, *supra* note 1, at 227.

80 *Id.* at 26.

81 *Id.* at 253.

82 5 U.S.C. § 706 (2000).

83 See *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002).

84 *Id.* (citing *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)).

85 See *Checkosky v. SEC*, 23 F.3d 452, 491–92 (D.C. Cir. 1994) (opinion of Randolph, J.).

action found unlawful can ignore § 706; at the same time, it would fly in the face of intelligent practice to ignore the fact that the text has not been dispositive of what has been done in all cases in which it was relevant. Lawyers and others engaged in the process of ascertaining the law look both to what has been, and to what is being, done:

Words of law are not givens of the world . . . . The very words themselves are not given. They are found. Even focal texts, that become concrete particulars of the lawyer's world for a time, carry no meaning a lawyer can reach up and break off like a bit of crystal. Constructing a statement of law to be acted upon, a lawyer constantly seeks a real meaning, drawn from all the evidence.

The evidence is not only other words. It includes action, what is done.<sup>86</sup>

And this fact about what we *do*, that trumps what we sometimes say, brings us nearer the heart of the matter. We might say that the principle of exclusion and inclusion is given in part by something operative inside the lawyer engaged in what we call "the legal process." In Vining's way of putting it, "The past and its texts enter the experience of legal authority through legal method and its presuppositions, which are subtler than statements commonly made about them would suggest . . . ."<sup>87</sup>

Lost on—or denied by—the maestro who looks for law exactly in text is the fact that before there can be law, there is a person making a decision. Democratically enacted rules of general applicability—whatever their wisdom and whatever their appeal to Friedrich Hayek—do not of their own vigor rise to the level of law for any community. No particular text or assemblage of texts stands as the law; and though it makes sense as a kind of shorthand to refer (as we do) to law's textual sources as the law itself, it makes nonsense of law to go on then to imagine that it exists apart from decisions leading to conduct. "There is always, in law, a decision maker, and what are called rules in law are expressions of considerations to be taken into account by a decision maker."<sup>88</sup> Vining continues:

They focus not on themselves as a self-contained system but upon decision-making activity pointing forward. Talk of rights and rules of a static kind, projecting an image of law standing off by itself, obscures the focus that legal rules have in fact, always a decision that

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86 VINING, *supra* note 1, at 127-28.

87 *Id.* at 110.

88 JOSEPH VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* 218 (1986).

must be made, at the edge of lives that have not been lived before, in a world that has not been seen before.<sup>89</sup>

Again, what the simplifications of the positivists and codifiers miss, in their efforts to get law nailed down, is that there is no law unless decisions are being made to guide conduct in the name of law. The question of what conduct is proper or permissible is a question of concrete fact, and unless we are talking about guides to conduct, we aren't quite talking about law, though we may be talking about its sources or about what gives evidence of it. And when it comes to what should shape and structure our guides to conduct in the inevitable thick of life's particulars, nothing is ruled out a priori, at least not absolutely.

Lawyers do not have nice specifications of what evidence can be looked to when inquiring what the law is on a matter. There is a technique, which is to focus upon a canon of texts and, if they are available, upon central texts generated by an institutional arrangement that is usually hierarchical in form. But in reading those texts, reading them seriously to understand them, lawyers do not "exclude evidence" (as a litigating lawyer would say), close their eyes to evidence of meaning (or lack of meaning). Some of that evidence is of the form we call sociological. All the evidence is about the life of the aspirations and ways of thinking with which lawyers work. . . .

There is as a consequence no notion of the "purely legal." Legal discourse is not a closed system. The meaning of texts is a real meaning.<sup>90</sup>

Why *must* this be so? Because it is intelligent human life and aspirations that are at issue. We do not confront "law" as largely inert automata: we come to law, and deciders create law, because of the constitutive human eros to discover the truth and to discover and instantiate the valuable. We can do less, but what essays in "law" that start some place other than with the importunate human subject miss is that law is about us, about us as we are and might yet become. "Law" that does not respond to our genuine needs reaches us as that "unintelligible restraint."<sup>91</sup> Law is a tool to assist in satisfying the human longing—the demand of inner law—to discover and live by the truth and to discover and instantiate the valuable; what fails to fulfill this function fails *pro tanto* to be law. Like other artifacts of our human creation, law cannot be used—except perversely—to frustrate the purposes, both those given and those chosen—of those who create it and who need it, of those always, already subject to inner law.

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89 *Id.*

90 VINING, *supra* note 1, at 75–76.

91 See George, *supra* note 13, at 146.



With respect to texts specifically, it is inevitable that those who create them today in aid of human living risk that those who come the next day will live in the past and dodge the day. But the practicing lawyer, tightly situated within the practical matrix of the work of making statements of law to be lived by, will—and, we can say, should—use the inherited texts not to dodge, but to meet, today's exigencies. That he sometimes does what he knows to be less is not an argument for settling for less in what we do in the name of law. Inner law does not go on holiday.

This subordination of texts in law to the (life) project of which they are a part risks appearing to undervalue texts, so it is worthwhile to emphasize why this appearance would be false. It is easy to identify the shortcomings of *Denzingertheologie* without appearing to slight the relevant texts, for no one engaged in Christian theology flirts with jettisoning sacred text. When, however, we observe that practicing lawyers regard—and argue that practicing lawyers *should* regard—texts as potential contributors to statements of law, not as the law itself and by itself, then we can seem to some insufficiently appreciative of text. What good lawyers do with text is very much like what students of sacred texts do with their texts, however, and the reasons for this similarity overlap, as Vining observes:

Close reading, reading in every detail and in every way, is at the very center of what lawyers *qua* lawyers do, and other parts of lawyers' method and the institutional structure of law are designed to make close reading possible. Anything closely read and reread must be there some time, always aging, if only to permit rereading. The rereading of some texts, the Confucian, the Vedaic, the Torah, for example, may go on forever.

But the large fact remains that in law focal texts, no matter how old, are not fixed. No legal text is immune from challenge and substitution, not even statute or constitutional provision. If one does not understand a text despite all efforts of one's own and others, if in the end it does not fit, has no resonance, it then cannot hold its place. . . .

. . . No one, again, simply mouths the words of legal texts. They are read for their meaning, translated, restated by one who, responsible for the effects of what he says and does, will give orders or contribute to orders as he believes himself to be ordered by what he hears. The search for authority is a search for a voice beyond the brute facts of the past unfolding into the present.<sup>92</sup>

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92 Vining, *supra* note 1, at 115.

Lawyers, like priests, turn to texts; and they pay them most careful heed. But just as the priest does not elide the text at hand with the Word of God, the lawyer does not substitute text for law. Lawyers turn to texts, which they have selected and arranged; these they read assiduously, not to echo them but in aid of making a statement of law to be acted upon. But that statement, though not determined by text, is not ungoverned: it must satisfy the speaker's need to speak only what is worthy of being acted on. What gives the statement its worthiness to be acted upon? The answer, which I have been suggesting, is encapsulated in this passing observation by Lonergan: "[O]ne has only to peruse such a collection of conciliar and pontifical pronouncements as Denzinger's *Enchiridion Symbolorum* 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>93</sup> One can turn to texts to engage in archaeology, or to find palindromes, or to . . . . One can generate texts to entertain, to edify, or to . . . . Alternatively, one can turn to texts, and one can generate texts, in aid of meeting "the questions of the day for the people of the day" as concerns their living in community where, in the name of the community, justified coercion can be used to back certain kinds of conduct and eliminate others.

In this seemingly innocuous formulation—"meet[ing] the questions of the day for the people of the day"—is contained the very heart of the matter, the core of a whole philosophy of law for worthy human living. Those who would say what the law is, and thus, expect obedience and not mere strategic compliance, must be meeting the questions of the day. Those not meeting the questions of the day are not worthy of being listened to by the people of the day, certainly not worthy of being obeyed by the people of the day. It would be a violation of their (our) own obligation to honor inner law to subordinate themselves (ourselves) to authorities ignoring their (our) questions. Those not meeting the questions of the day for the people of the day are, as lawyers say, prejudicial. Those worth listening to and obeying, because they do meet the questions of the day for the persons of the day, speak with authority. Vining says of the mind that possesses authority that it possesses it in virtue of its caring. "For law, mind is caring mind. Mind that does not care is no mind to seek, no mind to take into oneself, no mind to obey: It has no authority."<sup>94</sup>

In the idiom I introduced at the outset, the mind possessed of authority is the human subject who is *obedient to inner law*. To be meeting the questions of the day for the people of the day—through all the

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93 LONERGAN, *supra* note 19, at 296.

94 VINING, *supra* note 1, at 32.

quotidian researching, selecting, interpreting, evaluating, drafting, revising, submitting, arguing, rearguing, collaterally attacking, and so forth—is to be meeting that constitutive human eros that orders us out of ourselves to discover and affirm what is and what is valuable and then to live accordingly. It is the very process of answering the questions that issue from our rational nature itself that generates authority. The process is not ungoverned, but neither does the constitutive criterion to which it is subject enter arbitrarily or violently. The eros for the real and the valuable enters from the lawyer's own rational subjectivity; and though we are passive with respect to its entering, it enters, unless we block it for the time being. It never coerces our compliance, however, but awaits free obedience. This constitutive eros for the real and the valuable, "the pure question," must not be mistaken for the degenerate phenomenon that is idle curiosity or episodic questioning; it is, rather, the *unrestricted* desire to know the real and the valuable, which manifests itself in ever fresh questions that we can either meet—or evade.<sup>95</sup>

"Name it what you please," this eros drives and structures our worthy human living, and it does not make an exception for law, not even for "dogmatic democracy." Refusing to be dogmatic, it asks to govern the practicing lawyer's use of texts in aid of coming to decisions of law to be acted upon. This is not to make the silly claim that the work-a-day practicing lawyer is thematically aware of inner law. The suggestion is, rather, that when he or she is struggling to speak with the requisites of authority, the practicing lawyer is obeying inner law; and that when he or she is nagged by the injustice of unanswered questions or loose ends not tied up, it is the violation of inner law that is registering in conscience.

In sum: Those living in conformity with inner law avoid the temptation to transmute our quest for law into the imposition of unintelligible restraint. Awaiting our dedication to meeting its demands, inner law does not coerce us. The "pure question" reaches us from within, not *ab extra*, and it constitutes our very rationality and intelligence; choosing to honor it is to live on the level of the dignity of our rational natures. To do less remains possible, but settling for less leaves our normative and unrestricted demand for answers to the questions unmet, our human potential denied. "Every closing off, blocking, denial of the empirically, intelligently, rationally, freely, responsibly conscious subject is also a closing off, a blocking, of the dominance of the higher aspirations of the human spirit and the

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95 See Brennan, *Harnessing*, *supra* note 18, at 10-14.

human heart."<sup>96</sup> What we cannot do, without violating inner law, is to meet some questions arbitrarily or to ignore others: "Negatively . . . the unrestricted desire excludes the unintelligent and uncritical rejection of any question, and positively the unrestricted desire demands the intelligent and critical handling of every question."<sup>97</sup> The human subject who dodges questions lacks authority, even in "law."

#### IV. LOCATING AUTHORITY IN LAW: THE PROBLEM OF AUTHORITIES

We have traced law to authority, and authority to mind obedient to inner law; not text, but the mind meeting the questions of the day for the persons of the day speaks with authority. But not everyone who can speak with authority can go on to bind with the coercive power of the law backed by the might of "the state." We confront, therefore, the relationship between authority and authorities.

A brute fact that frequently comes down to us from the past, and frequently obscures the line between authority and authoritarianism, concerns authorities, a fact reflected in the ambivalent connotation and denotation of this English word "authorities." Sometimes the "authorities" are law enforcement folk conspicuous for their bluntness; other times the "authorities" are those who will get the work of justice done. When we "call in the authorities," or the authorities just arrive on the scene, we hope for the latter, but fear the former. We face the fact of men and women who ask to be regarded as authorities over us; the critical issue is to distinguish between those authorities who possess *authority* and those who cloak the authoritarian in legal garb. The barbarian "may wear a Brooks Brothers suit."<sup>98</sup>

The problem—we can call it the problem of the authoritarianism of false authorities—grows out of the conditions of cooperation. Acting alone, we can get very little done; reinventing the wheel assures either boredom or, in the alternative, an early demise. Cooperation, both across the ages and in the here and now, gets things done, and makes maintenance, and perhaps then improvement, possible. Cooperation can occur quite spontaneously, but the limits of spontaneous cooperation prove to be severe. Cooperation, if it is to continue, must be regularized. The more cooperation is reticulated, ramified, and reinforced, the more powerful it becomes, and the more that can be accomplished. Spontaneity gives way to custom, and custom gives way

96 10 BERNARD LONERGAN, *The Human Good as Object: Differentials and Integration*, in *THE COLLECTED WORKS OF BERNARD LONERGAN* 49, 63 (Robert M. Doran & Frederick E. Crowe eds., 1993).

97 LONERGAN, *supra* note 15, at 661.

98 JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS* 12 (1960).

to more formalized institutions. Offices are created, defined, and populated. Those who populate the offices we know as *authorities*, that is, "the officials to whom certain offices have been entrusted and certain powers delegated."<sup>99</sup>

As long as the authorities remain faithful to their offices and to the purposes for which those offices were created, and as long as conditions remain unchanged, things go as they did from the beginning. But conditions do not remain unchanged among the living. At the very least, new questions emerge. To take another example from administrative law, the question arises whether it would not be better for those charged with administering government benefits to proceed according to a grid rather than on a case-by-case basis. Would this not tend to assure more thoroughly informed and, therefore, intelligent results?<sup>100</sup> We might be able to go on doing things the old way, but these new questions invite new answers. Correlatively, the fact of new learning clarifies the possibility of, and invites satisfaction of the conditions of, progressive and cumulative learning. Cooperation is not just horizontal; as I observed above, it can be vertical and span the ages. In order to meet the questions of the day, changes will have to be made to accommodate and assure new learning (without becoming amnesiac about what we already know, condemning ourselves to reinventing the wheel).

Meeting the questions of the day for the people of the day means keeping up with new questions. To the extent, however, that offices have been designed and parceled out in a brittle way, the officeholders will lay claim to terra firma on which to resist new questions and the new directions in which they might lead. And even offices designed and parceled out with an openness to adaptation may by now be populated by authorities who have grown officious; instead of continuing the pattern of growing and ramifying cooperation that produced and populated the offices in the first place, the authorities dig in their heels and rule some challenges out of court. Today's questions are stifled; the possibility of progressive and cumulative learning, and with it more developed living, is denied. Stasis sets in and then is enforced; people begin to talk about the offices as though informed by Platonic forms. "[M]y only authority as a judge to pre-

99 LONERGAN, *Dialectic of Authority*, in A THIRD COLLECTION, *supra* note 60, at 5, 7.

100 See, e.g., *Heckler v. Campbell*, 461 U.S. 458, 467 (1983) ("[T]he use of published guidelines brings with it a uniformity that previously had been perceived as lacking. To require the Secretary [of Health and Human Services] to relitigate . . . at each hearing would hinder needlessly an already overburdened agency.").

vent the state from doing what may be bad things is the authority that the majority has given to the courts."<sup>101</sup>

To press the mutability of offices is *not* to call for a roving constitutional convention; indeed, quite the reverse. It won't do to live, as Michael Oakeshott said of Descartes, every day as though it were one's first.<sup>102</sup> For the reasons I have been developing, offices need to be structured in such a way as to facilitate drawing on and further developing and (as necessary) correcting inherited knowledge and wisdom. Nothing short of "[t]he stages of human historical process" depend on people's success in developing methods for becoming "more reasonable and responsible in the various arrangements of their cooperative and personal living."<sup>103</sup> The creation of offices that allow us to live more reasonably and responsibly, by meeting the questions of the day, is the low door in the wall that leads to a decent or perhaps even better future. As Joseph Flanagan observes portentously: "We can mark off [the] major periods in the history of culture by the way different historical communities control [the] functions of knowing and choosing, or by the different methods that cultures have developed to govern their personal and collective making of history."<sup>104</sup> The key is to keep the offices in service of living, in service—that is, not of the status quo ante, but of progressive and cumulative learning that meets the questions of each new day.

The original parceling out of offices, by custom and usage, was justified in fact by their contributing to meeting the questions of the day for the people of the day. As custom and usage give way to law, the legalistic solution is always just around the regulatory corner. Legalism enjoys some of law's aura and prestige, but is much more efficient. Its peculiar genius is not to get hung up on the questions of the day; its flaw is that, at least in the long run, it would prove fatal for the persons whose questions go unmet. Of course, if we succeed in ignoring or denying, first, that persons have questions about how to live and live well, or, second, that in failing to meet them in our collective living is to violate the inner law that we humans have in common, then we inure ourselves to some of the consequences of their going unanswered. We get used to that phenomenon identified by the phi-

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101 Scalia, *supra* note 33, at 88.

102 See, e.g., Brennan, *Rule of Law*, *supra* note 18, at 252 (quoting JEFFREY STOUT, *THE FLIGHT FROM AUTHORITY* 49 (1981)).

103 JOSEPH FLANAGAN, *QUEST FOR SELF-KNOWLEDGE* 256 (1997).

104 *Id.* at 222.

ilosopher-historian Eric Voegelin as the interdict on the question,<sup>105</sup> and so it happens that "[a] civilization in decline digs its own grave with a relentless consistency."<sup>106</sup>

A complete anesthesia of the desire for the real and the valuable—an effective repression of the pure question—is a rare occurrence, however. Whatever the case with the neighbors (or the aliens or the poor or the disenfranchised) and what we hear said to be "good enough" for them, we have our own—and those we love and care about have their own—questions. We want to know this world, to know what is valuable. Inner law keeps inviting us to transcend the isolation of pure interiority, inviting us to answer and not to interdict the questions that are our bridge to the real and the good. Our wanting to be knowers, our wanting to be people who discover the valuable—this is half, but only half, of the core of authority in law.

Not only do we desire to *know* the valuable; we also and concomitantly desire to instantiate it in our living. This is the other half. Just as knowing has its conditions (which are either satisfied or not), so too does instantiating the valuable. Desiring and knowing the valuable are not sufficient to the realization of its instances. There is nothing abstract or armchair about this: concretely, succeeding—realizing the valuable in our living—requires cooperation, and cooperation works itself out in social structures. Social structures—such as economies, school districts, clubs, and corporations—succeed by helping us meet the questions of the day; they fail, and they cause us to fail, by leaving our questions unanswered, by stifling further questions.<sup>107</sup>

The social structure that is the legal system, our current concern, is good at getting us authorities, but the question ever remains whether the authorities are assisting us in meeting the questions of the day, questions about how to instantiate the valuable here, now, and tomorrow. Authorities who do in fact assist us in this project possess authority; they lack authority to block or fail to assist our common engagement in this process of creating and developing structures that lead to instances of valuable living. In the context of law, the other half of authority's core consists of the concrete conditions in which we succeed in instantiating the valuable in our living.

The locus of authority in what we do in the name of law, then, is the community engaged in the ongoing work of asking and answering

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105 4 ERIC VOEGELIN, *ORDER AND HISTORY* 330 (1980) (explaining that the interdict on the question "makes the existentially open participation in the process of reality impossible").

106 LONERGAN, *supra* note 19, at 55.

107 For this phenomenon understood as sin as a component in social structures, see LONERGAN, *supra* note 96, at 60–61.

questions about the real and the valuable and creating the conditions for the progressive and cumulative entrance of knowledge about and the realization of what is truly valuable. Authority appears in the concrete judgments the community's decisionmakers—the community's "authorities"—reach in the name of the law. But though those appearances of authority are the personal achievements of individual human subjects, they would lack the authority necessary to be law for the community to the extent that they did not reflect and bear the community's inherited but cutting-edge insights into valuable living. Not for any reason having to do with the priority of "democracy," but because of the community's nonfungible accumulation of wisdom into the conditions of valuable living and ongoing engagement with the questions of the day, the community possesses authority. Descartes, by assaying to live every day as though it were his first, cut himself off from the community and thus from the possibility of meeting the questions of the day for the people, other than himself, of the day. Those who are meeting the questions of the day for the people of the day enjoy authority; those who are doing this on behalf of the community and with authorization to give it effect, even coercive effect if necessary, are the locus of authority in law.

Bernard Lonergan identifies authority with "the community that has a common field of experience, common and complementary ways of understanding, common judgments and common aims."<sup>108</sup> If there is a terminological trouble with this identification, it concerns Lonergan's locating authority in the community without regard to the nature and quality of that community's field of common judgments and aims.<sup>109</sup> On Lonergan's usage, a community of persons would enjoy authority no matter how dogmatically closed it was to further learning. Lonergan does go on at once to distinguish between "authentic" and "unauthentic" fields of common judgments and aims, and thus between authentic authority and unauthentic authority.<sup>110</sup> Fundamentalist communities would therefore possess authority, but lack "authentic authority." Lonergan's usage is workable, but it would seem more to the point, and truer to common usage, to identify as authority—and authoritative—the community that is engaged in and

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108 LONERGAN, *supra* note 99, at 7.

109 *Id.* at 8 ("[A]uthenticity legitimates authorities and unauthenticity destroys their authority and reveals them as merely powerful.").

110 Max Weber identified "authority" with "domination" and then distinguished "authority" from "legitimate authority," thereby beginning a tradition that tends to assimilate authority to domination. For Weber's usage, see 1 MAX WEBER, *ECONOMY AND SOCIETY* 31, 53–54 (Guenther Roth & Claus Wittich eds., Univ. of Cal. Press 1978).



committed to furthering judgments and aims that ask and answer the questions of the day, and as authoritarian the community that is collectively engaged in blocking the asking and answering of questions.

We began by inquiring into "the locus of authority in what we do in the name of law." We have answered by tracing such authority to the community, more specifically, a community "living by the question"—that is, engaged in a common enterprise of asking and answering questions and then cumulatively and progressively creating the conditions that allow living by the results. Decisions guiding conduct and taken in the name of law rise to the level of law for the community by their being bearers of the community's present body of insight into valuable living and the means of its achievement. The creation and preservation of texts can aid the progressive and cumulative development of insight into such human living and the creation of conditions therefor; approached another way and with lesser purposes, the same texts can stunt or block valuable human living. If, as the possibility of progressive and cumulative results will demand, the community "transmits" its authority to agents with specific offices, thereby creating authorities, satisfaction of the conditions of authority ever remains necessary if the authorities are not to sink to the level of authoritarian bureaucrats.<sup>111</sup>

As to exactly how those conditions can be satisfied once such a transmission has been effected, something remains to be said in the final Part. What I would emphasize first, however, is that to the extent that the authorities have given up being part of a communal project of asking and answering questions—that is, if, in Lonergan's idiom, they have given up being authentic—to that extent they have divested themselves of authority. Nor, would it matter that the office "requires" this of them. Authorities may continue to wear the externalia, the badges of office that allow them to be recognized and distinguished from the vigilante; but unless they are in fact bearers of the community's learning about and quest for valuable living, they are mere authorities who lack authority. Whether someone merely wears the badges of office or actually, in addition, possesses authority—this remains always a question of concrete fact.

Besides authority there are also needed authorities. If there are to be authorities, then over and above their authenticity there is needed some external criterion by which their position can be pub-

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111 On the history and philosophy of the "transmission" theory of authority, see, for example, YVES R. SIMON, *PHILOSOPHY OF DEMOCRATIC GOVERNMENT* 158-75 (1951), analyzing the views of Aquinas, Cajetan, Bellarmine, and Suarez on the transmission theory.

licly recognized. But while this external condition is a necessary condition, it is not a sufficient condition. The sufficient condition must include authenticity. The external criterion need not be accompanied by authenticity. For in human beings authenticity always is precarious. Commonly, indeed, it is no more than a withdrawal from unauthenticity.

Such, then, is the dialectic of authority.<sup>112</sup>

Authorities do not necessarily act with authority. There is the ultra vires act; more fundamentally, there is the act by the authority that, forsaking what authority it might have enjoyed, becomes officious and ceases to engage in meeting the questions of the day for the people of the day. By not allowing the questions of the day to occur, the authority decamps from authority to the authoritarian. It can be subtle, but its effect is blunt. Correlatively, authority, and with it law, is forever a fragile achievement.

#### V. THE DIALECTIC OF AUTHORITY: A SURE END TO "SOVEREIGNTY"

This dialectic, "the dialectic of authority," will come as a disappointment to some. Among the disappointed will be those who had hoped to get on in law with as little appearance of genuine authority as possible; for these, such as Justice Scalia, the admission of authority in law as other than a democratically sanctioned license amounts to a necessity to be minimized. Also among the disappointed will be those who, frankly admitting the need for nonmarginal authority in the legal enterprise, would lodge and cabin it in firmly delineated offices and their officious personnel; for these, linking authority—and with it law—to a "dialectic" undermines the very solidity that law and its rule of rules were supposed to be about. But this dialectic, though not what many had wanted, may be just what we need; it is in any event the best we can do, though we often do much less.

Or, rather, seen from another angle, we often purport to do very much more. Law that is nothing short of "sovereign" is what David Dudley Field boasted.<sup>113</sup> The alternative position developed here has been that, in the sense in which we ordinarily speak of it, law is necessarily subordinate to (the dialectic of) authority and to inner law, and therefore never possessed of sovereignty. Of course, "sovereignty" is a slippery enough term that, with a little effort, one might be able to make it fit human law that is subordinate to authority and inner law. But, as Stanley Benn concluded in his study of sovereignty, "[t]here

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112 LONERGAN, *supra* note 99, at 11.

113 See *supra* note 24 and accompanying text.

would seem to be a strong case for giving up so Protean a word,"<sup>114</sup> and that case, as made out by Jacques Maritain, is that "the term needed [in constructive political discourse] is not Sovereignty."<sup>115</sup> The word conjures a legal regime that is a closed system from which no appeal lies. It was Maritain's sober judgment that "[t]he two concepts of Sovereignty and Absolutism have been forged together on the same anvil. They must be scrapped together."<sup>116</sup>

The United States of today is no totalitarianism of the sort Maritain was reacting against, of course. However, a state in which (we are told) God takes care of the natural law and the judge simply dispatches the democratic majority's business (except in the limit case in which he recuses himself), is a state that has smuggled pseudo-sovereignty in through the back door of the courthouse. What humans do in the name of the law is always only penultimate, never sovereign or absolute. If, as Vining says, lawyers (like priests) sometimes speak for the sovereign,<sup>117</sup> this would be because they live in the dialectic of authority, not pretending to sovereignty but seeking authority in the only place it can be found.

What is created in decision making by participants in the process [of law] can never be celebrated as individuals' self-governance—their own however contingent or arbitrary, legitimate whatever it is—for it is not their own lot but others' that is being fashioned.

Knowledge of this is part of knowledge of law and continuously reconfirmed by practice in the actual operations of the organized human world. This is the strength of law, this knowledge. All are trustees, participants and decision makers alike, arguing, deciding, approving, reacting. All is discussion of value, all is drawn forward by value, all identification through time with those who are affected in the future and those who have made decisions in the past is through value. And the central concern of law, atheoretical, pretheoretical, is then connection of value and responsible mind, for value not connected by mind to responsible belief is mirage, nothing, vanishing when questioned or sought.

Thus law is at work before any political theory, and after political theory is finished speaking: nothing is secured by any tracing of power or jurisdiction to a formal source or process, kingly, judicial, legislative, or popular. Against the constant fading of the condi-

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114 Stanley Benn, *The Uses of 'Sovereignty'*, 3 POL. STUD. 109, 122 (1955).

115 JACQUES MARITAIN, *MAN AND THE STATE* 49 (1951).

116 *Id.* at 53.

117 VINING, *supra* note 1, at 263 ("Lawyers and theologians reach for the sovereign, look to the sovereign, speak for the sovereign, something or someone to pay serious attention to, or, to use the liturgical term, to praise.").

tions of authority is what comes from law that pushes toward the personal and a context of decision making in which the personal can be recognized, recognition of the personal being the only entrance to the experience of authority.<sup>118</sup>

In law, there is always a decisionmaker; which is why Vining is right to focus on the action of the individual's mind bringing value to bear on a decision of consequence. That individual subject acting through office in the name of the law, though he alone is responsible for satisfying the conditions that give him authority, does so by drawing on the common fund and dynamic of the community. Although the community needs its authorities, and thus needs to create offices, it is the community itself that is jurisgenerative—not by merely being a democratic majority, but, as I have argued, by living by the question. The common strain of thought that looks for law in the dictates of the state to the individual overlooks the true springs of authority in the community's common engagement in asking questions, answering them, and then, with the help of authorities, living by those answers.

Which brings me to the issue I reserved above, viz., how the conditions of "living by the question" are satisfied once the community has transmitted its authority to authorities. This is a complex problem, which I can address here only in outline. The preceding analysis has clarified that there is no authority where its conditions are not satisfied; the problem that attends the simple failure of those conditions to be satisfied is the different problem of counterfeit authorities—that is, of authoritarianism. This seems simple enough, except that the satisfaction of the conditions of authority is not, however, a scalar quantity. Most, if not all, concrete situations—and decisions guiding conduct are never taken apart from concrete situations—embody a messy amalgam of questions answered and questions evaded or suppressed. Lonergan suggests that sometimes what can be done in the face of such situations will amount to little more than the withdrawal from the inauthenticity and authoritarianism into which we have slipped.<sup>119</sup> Most of the time we find ourselves in a world in which what inner law requires of us is not an all-or-nothing choice, but rather the choice to work as we can to be authentic ourselves and to encourage its conditions in the communities and social structures of which we are contributing members. In law, conscientious disobedience and recusal are examples of the more aggressive response that may be required. Revolution is the limit case.

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118 *Id.* at 281.

119 See LONERGAN, *supra* note 60, at 233–38.

In those times before revolution and even before recusal or conscientious disobedience, one problem having to do with authority concerns how to keep the authorities—that is, the government officials who constitute “the state”—meeting the questions of the day for the people of the day. This is the problem on which most of contemporary constitutional theory of the “communitarian” or “civic republican” sorts has focused, and its focus on “dialogue” as the legitimating condition of governing has obvious parallels with my conditioning authorities’ authority on their meeting the questions of the day for the people of the day.<sup>120</sup> The difficulties of solving this problem have largely prevented constitutional theorists of the sorts mentioned from facing that other, related problem of how such government is to create and sustain conditions in which nonstate actors can live by the question, and, in doing so, shape the actions taken by their authorities.

The problem concerns not only the overt mechanisms of self-government; it also reaches its antecedent, that is, culture. By “culture” I mean the set of reasons and values we have for individual and collective action. Cultures are not given by nature; they have to be created and recreated (or de-created), and they are to be judged valuable, like social structures, inasmuch as they encourage us to ask questions and proceed to live by the answers.<sup>121</sup> A state bureaucracy fueled by intelligent asking and answering of questions will be of little value or relevance to a populace inculturated into passivity, drifting, lethargy, and rote rule-following. It has to be question-and-answer from the bottom to the top; anesthetized subjects are ripe subjects for authoritarian depredations, not for authority and the law it can generate.

Because living by inner law means living in community (society)—no one meets questions except within a common horizon of experience, understanding, knowledge, values, and aims—the state (that is, government) will have as part of its essential work the encouragement of communities committed to collective learning. The vitality of such communities will depend more on friendship and love than on the aid of the state, but the state, too, at least much of the time, will have a positive responsibility to nurture such communities; indeed, the nurturing of such communities will be one of the reasons that justify the very creation of that part of the community that we refer to

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120 See, e.g., Paul Kahn, *Community in Constitutional Theory*, 99 YALE L.J. 1, 7 (1989) (“[E]ach of the new communitarians fails for the same reason: the authoritarian character of constitutional law is inconsistent with the egalitarian quality of the community of discourse.”).

121 See FLANAGAN, *supra* note 103, at 200; Thomas Kohler, *The Integrity of Unrestricted Desire*, in AUTONOMY AND ORDER 61–65 (Edward W. Lehman ed., 2000).

as "the state." The *authority* of such communities does not derive from the state; the authority of any community comes from its collective obedience to inner law, and the state is that part of the community of persons united by a set of questions having to do with the good of the whole body politic that is authorized or empowered to give public effect to answers.

With respect to authorities acting in the name of "the state" and its law, we should anticipate a dialectic of authority. When, then, we observe Justice Scalia tilting too far in the direction of rigidity, closure, and "dogmatic democracy," we do well to recall Professor Glendon's reference to "our legal culture."<sup>122</sup> Scalia's bid for radical reform operates against a background of intelligentsia who deny—through a form of judicial imperialism that falls at the other end of the spectrum from Scalia's—that values worth living by emerge through the community's (or, rather, communities') collective inquiry (or inquiries). As we assess Scalia's attempt to redress an imbalance caused by judicial legislation in derogation from the central moral tradition of the West, we observe a case in this point of Vining's: "Disputes in constitutional or administrative law are almost always in part about the design of institutions that will make law possible," by making authority possible.<sup>123</sup> If we sympathize with Scalia's attempt to create a closed universe of legal texts in response to a (legal) culture that would entrust judicial actors with power that many have grown accustomed to abuse, still we must observe that the unreasonable responses that unreasonable situations call forth remain, for all that, unreasonable. "The claim of illegality, persuasively made, is always the claim that what is, even if it has always been done, has no authority."<sup>124</sup> Except for the appearance of prophet or saint who shocks people into new ways of aspiring and living, the transitions to be made must be one at a time, meeting the questions of the day for the people of the day.

I have emphasized the *dialectic* of authority, but the final word must go to what at the outset I described as the "rock" on which we can perform the necessary dialectic. That rock on which we can build is the human subject's dynamic orientation toward, by way of his primal and unrestricted desire for, the real and the good. That rock is not a theory or a text, but it provides the concrete conditions under which the subject begins to move from pure interiority and come to know the real and the valuable and, then, to instantiate the valuable in his living. A full account of our interiority lies, of course, beyond

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122 Glendon, *supra* note 73, at 113.

123 VINING, *supra* note 1, at 312.

124 *Id.* at 112.

the scope of this inquiry into authority in law; the goal here has been to suggest, in a preliminary way, why nothing else than meeting the human subject's eros for the real and the valuable—that is, inner law—will supply the authority necessary to law and worthy human living.

Michael Novak once said, in a self-conscious development of the tradition, that the unrestricted desire for the real and the valuable is our "natural law."<sup>125</sup> That unrestricted desire does not compel us; God does not apply the natural law; our God-given drive for intelligence about the real and the valuable awaits our response:

We are committed [to the realm of fact and value], not by knowing what it is and that it is worth while, but by an inability to avoid experience, by the subtle conquest in us of the eros that would understand, by the inevitable aftermath of that sweet adventure when a rationality identical with us demands the absolute, refuses unreserved assent to less than the unconditioned and, when that is attained, imposes upon us a commitment in which we bow to an immanent Anagke.

... The critical spirit can weigh all else in the balance, only on condition that it does not criticize itself. It is a self-assertive spontaneity that demands sufficient reason for all else but offers no justification for its demanding. It arises, fact-like, to generate knowledge of fact, to push the cognitional process from the conditioned structures of intelligence to unreserved affirmation of the unconditioned. It occurs.<sup>126</sup>

The conquest is subtle. History reveals the frequency with which it occurs or fails to occur, and its further occurrence remains a choice. Such is the dilemma of living, including in law. The legal analogue of *Denzingertheologie* does remain a possibility—but only for those slouching into authoritarianism.

#### CONCLUSION

In conclusion, it remains to be said that it is not because our constitutive eros for the real and the valuable is (we think) coextensive with the entire world in which we live, and which we might create, that the last word goes to it; it has the final say because its scope is unrestricted. Our questions concern the beyond, and what is beyond what we know and do in this world is what promises to fulfill that unrestricted desire once and for all. The question who "we" are is, as I

<sup>125</sup> Michael Novak, *Bernard Lonergan: A New Approach to Natural Law*, 41 PROC. AM. CATH. PHIL. ASS'N 246, 248 (1967).

<sup>126</sup> LONERGAN, *supra* note 15, at 355–56.

signaled at the outset, expansive. Denying that the form and direction of our political life have anything to do with life beyond the here and the now, Justice Scalia would build a wall between this world and the beyond. What this occludes is the fact that those who follow the question in the here and now are—whether they recognize it or not—on their way to what is surpassing; they are on the way to recognizing the true and only Sovereign. “The question of God,” as Lonergan says, “lies within man’s horizon. . . . The contemporary humanist will refuse to allow the question to arise. But their negations presuppose the spark in our clod, our native orientation to the divine.”<sup>127</sup>

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127 LONERGAN, *supra* note 19, at 103. It may well be that we have become as a people almost incapable of recognizing the spiritual element in our constitution, but our ignorance does not alter our given constitution. See Steven D. Smith, “Hollow Men”? *Law and the Declension of Belief*, in CIVILIZING AUTHORITY, *supra* note 19, at 197, 197–99.



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