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"Law has not accepted the spirit of the age that (in Keats's words) would clip an Angel's wings and empty the haunted air."—Joseph Vining[1]

I. DISCOVERING (THE ABILITY TO MAKE) LAW

OUR lives are laced with law from beginning to end. It starts with who gets to be born; ranges over what we foods we can eat, what drugs we can take along the way, the days and hours we can imbibe or purchase Chartreuse; and rounds out its tour of duty with where one's cremated remains can be scattered when the food, the drugs, and the secret of that green elixir of 130 Alpine herbs no longer matter. Law's place in our society is vast by any historical comparison. Theologian Oliver O'Donovan comments sardonically that today, "[a]n incessant stream of lawmaking is the fundamental proof of political viability."[2] Joseph Vining takes a different tack: "Law will not be acknowledged soon by the articulate. . . . But . . . the legal form of thought is not about to die from disuse. And if law itself should begin to disappear, then, like air, its absence might press its necessity into consciousness."[3]

Surrounded as we are by law on all sides, we must beware the normative power of the actual. It was not always so. Nor need it be so. To be a language-using animal is natural to us, but hardly necessary or automatic; we can instead gawk. Likewise, to make law is natural to us, but it is not a certainty of physics that we *will* make law to live by; chaos is possible, at least for a season or two. In my favorite of his four books, *From Newton's Sleep*, Vining asks, "Could some fall into what Blake envisioned two centuries ago as Newton's Sleep?" And he answers, "Legal thought is the daily

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1. JOSEPH VINING, THE AUTHORITATIVE AND THE AUTHORITARIAN 5 (1986).

2. Oliver O'Donovan, *Government as Judgment*, *in* BONDS OF IMPERFECTION: CHRISTIAN POLITICS, PAST AND PRESENT 207, 213 (Oliver O'Donovan & Joan Lockwood O'Donovan eds., 2004). O'Donovan develops his critique of deliberate lawmaking at great length in OLIVER O'DONOVAN, THE WAYS OF JUDGMENT: THE BAMPTON LECTURES, 2003 (2005). For a telling critique, along the lines to be developed here, of O'Donovan's objection to the civil authority's ordering things in the future for the common good, see Thomas W. Smith, Book Review, 70 THE THOMIST 300 (2006) (reviewing OLIVER O'DONOVAN, THE WAYS OF JUDGMENT (2005)).

3. JOSEPH VINING, FROM NEWTON'S SLEEP 4 (1995).

exercise that not only allows us to sleep in peace, but keeps us from Newton's Sleep."[4]

Remarkably, and especially so from our perspective within a law-laden culture, the capacity to make law, though latent in human potential from the beginning, is itself a *discovery*. As Friedrich Hayek famously remarked, "[t]he deliberate making of law, has justly been described as among all inventions of man the one fraught with the gravest consequences, more far-reaching in its effects even than fire and gun-powder."[5] Expounding on this passage, Russell Hittinger notes that "[w]e can roughly mark the date when this new kind of gunpowder was invented. The year was 1231."[6] The discovery was made by Frederick II, the Holy Roman Emperor and also the King of Sicily. One can study the results in the *Liber Augustalis*, also known as the *Constitutions of Melfi*, promulgated on account of a perceived "greater need for justice."[7]

My current interest is the fallout from the (re-)discovery of that capacity beginning some half a millennium later, first by the English and then later by the Americans. As readers of law reviews are amply aware, the law of England was long constituted primarily by the "common law." With the bulk of law thus said to be found or made (the difference need not detain us here) by judges on a case-by-case basis, legislation—statutes made from scratch by a legislature—remained for centuries the upstart exception in terms of the nature and sources of English law. Until about the eighteenth century, a legislature's deliberately making new law by voting to enact a bill was exceptional in the English legal system.

As time went along, minds continued to differ, moreover, on the question of whether legislation was to be favored and increased, or disfavored and cabined. Thomas Hobbes (1588 - 1679) early on had important things to say on behalf of making law through legislation, but it took another century until Jeremy Bentham (1748 - 1832) undertook to advocate systematically for proliferating legislation in a fully rationalized codification.[8]

Not more than a century after Bentham began writing, Sir John Robert Seeley reported, in 1885, that Englishmen by then lived in a "*Legisla-*

4. *Id.* at 210.

5. 1 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY: RULES AND ORDER 72 (1973).

6. Russell Hittinger, *Natural Law and the Human City*, *in* CONTEMPORARY PERSPECTIVES ON NATURAL LAW: NATURAL LAW AS A LIMITING CONCEPT 29, 31 (Ana Marta González ed., 2008).

7. THE LIBER AUGUSTALIS [CONSTITUTIONS OF MELFI PROMULGATED BY THE EMPEROR FREDERICK II FOR THE KINGDOM OF SICILY IN 1231] 5 (James Powell trans., Syracuse Univ. Press 1971).

8. *See* JEREMY BENTHAM, CODIFICATION PROPOSAL, ADDRESSED BY JEREMY BENTHAM TO ALL NATIONS PROFESSING LIBERAL OPINIONS (London, J. M'Creery, 1822). Bentham did, however, perceive something of the impossibility of his project. *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 21-24 (2006).

tion-state."[9] There was by then broad agreement, Seeley went on to observe, "that there is a vast amount to be done, that we have more work before us than can possibly be overtaken," and that, as a result, "governments ought to be continually busy in passing important laws." All of this, Seeley concluded, was exceptional: "Historically, this is as unlike as possible to the doctrine of other periods. The state in other times . . . was not supposed to be concerned with legislation."[10] Seeley must have been confining himself to describing the English situation, because Frederick, to recur to the example alluded to above, had by no means hesitated to legislate for his Sicilian subjects in 1231. Nor was Frederick alone in legislating on the Continent. Napoleon comes to mind.

Returning our attention closer to home, although Seeley purported not to be passing judgment, his objection is palpable. Others followed suit. Writing the better part of another century later, Grant Gilmore remarked an "orgy of statute making"[11] that began in the United States in the 1930s, and one would not rush to find in the phraseology of the sober Gilmore an approval of the orgiastic. Writing in 1982, then-Dean (now-Judge) Guido Calabresi lamented that Americans were "choking on statutes."[12] "All agree," Calabresi went on to observe, "that modern American law is dominated by statutes."[13] Justice Antonin Scalia summed up the situation, without here passing judgment for or against, when he stated, in 1997: "[w]e live in an age of legislation, and most new law is statutory law."[14]

Justice Scalia has, however, made abundantly clear that this state of affairs, the predominance of enacted law, is very much to his liking. For one thing, it is allegedly democratic, in the sense that the laws are made by the people's representatives, not by judges.[15] For another, and this is by far the more important point for present purposes, it is an ontologically abstemious enterprise, or at least Justice Scalia insists it *can*—and *should*—be. "[A] system of enacted law, *properly applied*,"[16] avoids, according to Justice Scalia, appeal to anything ontologically thick. This is because, if Scalia is to be believed, a system of enacted law "properly applied" involves appeal to nothing more than the ordinary public meaning of statutes. This, in a nutshell, is the theory of legal interpretation called "textualism" that Justice Scalia has been promoting for several decades: "What I look for in

9. JEREMY WALDRON, THE DIGNITY OF LEGISLATION 7 (1999) (quoting Sir John Robert Seely).

10. *Id.* at 8 (quoting Sir John Robert Seely).

11. GRANT GILMORE, THE AGES OF AMERICAN LAW 95 (1977).

12. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982).

13. *Id.* at 183 n.1.

14. 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, 13 (Amy Gutmann ed., 1997).

15. *See id.* at 9. *See also* Antonin Scalia, *Review of Steven D. Smith's Law's Quandary*, 55 CATH. U. L. REV. 687, 689 (2006) (book review).

16. Scalia, *supra* note 15, at 689 (emphasis added).

the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended."[17] I assume the reader is familiar with textualism as a possible interpretive strategy, but the reader may not have adverted to the fact that one of its boasts, according to Justice Scalia, is that it involves nothing ontologically dense, only texts and their "'objectified' intent."[18] The context for Scalia's denying that law requires anything ontologically dense was Steven Smith's argument to the contrary, an argument he advanced with reliance on the insights of Joseph Vining.[19]

Textualism is only one among many available interpretive approaches to legislation, needless to say, but here it can function in the mode of synechdoche as we inquire into the place of legislation in law. Textualism provides the limit case of a general jurisprudential approach to enacted law that would render a statute to be the law *ex proprio vigore*. We can ask, then, whether, on occasions when statutes are concededly the starting points of a particular legal analysis, discovering and giving effect to the "'objectified' intent" of pieces of enacted law is in fact all there is to the legal enterprise. We can ask, further, whether statutes are ever law in their own right.

Hardly, or so I shall argue here, partly on the basis of Justice Scalia's own *performance*. One manifestation of that something more, the one that will concern me here, appears in (as I shall call it) the passage from legislation to law. Though it may come as a surprise to those not trained in law, legal theorists and others, including textualist judges, are not in agreement that legislation is *per se* law. Some theorists, including the distinguished political philosopher and jurist Jeremy Waldron, affirm that legislation is law.[20] Others, such as John Chipman Gray, deny the claim: "[L]egislative acts, statutes, are to be dealt with as sources of Law, and not as part of the Law itself . . . ."[21]

Joseph Vining, whose work is my principal interest in this paper, makes a slightly different, iconoclastic, and potentially decisive, claim: "[L]egislation is a problem in law, not central to law."[22] We undeniably live in a legislation state, yet legislation is, at least according to Vining, a *problem* in law, not central to it.

Vining's claim, too, is disputed, as by Waldron. Not only does Waldron maintain that legislation is law; exasperated by the view according to

17. SCALIA, *supra* note 14, at 38.

18. *See id.* at 17. Which is not to say that "context" is not vital to determining the original meaning. *See id.* at 37. On the lack of anything ontologically dense, see Scalia, *supra* note 15, at 694.

19. *See* Scalia, *supra* note 15, at 692-94. *See also* STEVEN D. SMITH, LAW'S QUANDARY 170-75 (2004).

20. *See* WALDRON, *supra* note 9, at 10-11.

21. JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 119 (reprint 1999) (1909).

22. VINING, *supra* note 3, at 155.

which statute law is "a low-bred parvenu, all surface and no depth, all power and no heritage, as arbitrary in its provenance as the temporary coalescence of a parliamentary or congressional majority,"[23] Waldron has recently put in three cheers for statutes in a book bearing the title *The Dignity of Legislation*. Waldron's stated goal in the book was "to try to recover and highlight ways of thinking about legislation that present it as a dignified mode of governance and a respectable source of law."[24] In marshalling his case, Waldron brings to bear the arguments of Aristotle, John Locke, and Immanuel Kant, among others. As we shall see, Aquinas, whom Waldron does not enlist, is another, different sort of ally.

Who is right—the champions of legislation, or legislation's critics? Those who affirm that legislation is law, or those who deny it? Or, for a third possibility, those who recognize the ways in which legislation, as commonly understood, both *is* and *is not* a problem in law? The last group, I submit, for reasons that I shall develop in the pages ahead. But this much can be said now. Legislation is something we make in abundance, something we are existentially free not to make, and something we perhaps should make, *and for moral reasons that are also properly legal reasons*—but should make only, I shall argue, on condition that we not think that what gets enacted is itself necessarily *per se* the law. A consideration of the ways in which legislation in fact functions *in the actual process of saying what the law is* will begin to shed light our deeper ontological commitments about what law is, and, correlatively, about who we are and who we believe we ought to become. It will illuminate what Vining likes to call, in a felicitous phrase, "the legal mind,"[25] though perhaps in ways that are even more law-governed than Vining, for his part, believes *free* minds can be.

II. LEGISLATION IN LAW

In inquiring into how legislation *in fact* functions in the process of making law, we will need an example. We can do no better than the Administrative Procedure Act (APA), a statutory "second-level constitution"[26] (as Joseph Vining has described it), which, as Justice Robert Jackson explained in the first Supreme Court opinion that construed the APA, "settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest."[27] Justice Jackson even warned ominously of "a disservice to our form of government and to the administrative process itself" if the courts were to

23. WALDRON, *supra* note 9, at 11.

24. *Id.* at 2.

25. *See, e.g.*, Joseph Vining, *The Resilience of Law*, *in* LAW AND DEMOCRACY IN THE EMPIRE OF FORCE 151, 165 (H. Jefferson Powell & James Boyd White eds., 2009).

26. Joseph Vining, *Administrative Agencies*, *in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 6-7 (Leonard W. Levy et al. eds., Supp. I 1992).

27. Wong Yang Sung v. McGrath, 339 U.S. 33, 40 (1950), *modified*, 339 U.S. 908 (1950).

disregard "the terms of the Act." Enacted by a *unanimous* Congress in 1946 (and later amended in terms that are not here relevant), the APA has remained "on the books" ever since, providing, as practicing lawyers know all too well, the default provisions setting out the procedures of operation for all of the dozens and dozens of federal administrative agencies, from the Social Security Administration to National Labor Relations Board. The Act's "default" character is the result of its remaining possible for the Congress to provide, as it frequently does for particular agencies, provisions different from those set out in the APA. Congress legislated in the APA itself, however, that a "[s]ubsequent statute may not be held to supersede or modify [it] . . . except to the extent that it does so expressly."[28] Like the Constitution, then, which specifies the terms of its own amendment, the APA limits the terms of its modification or supersession.

Pivotal to the APA's operation is its distinction between agency "rule making," which is like what legislatures do, and agency "adjudication," which is like what courts do. A different battery of procedures and process applies to rule making than to adjudication. An agency must know, therefore, whether what it is about to do is a rule making or an adjudication, and for this determination the APA provides definitions. According to the APA's definitional section, adjudication is the procedure for producing an "order," and "rule making" is the procedure for producing a rule. Having thus defined these activities of government by reference to their products, the APA in effect provides (with an exception that is not here material) that an "order" is every agency output that is not a "rule." The APA's definition of what a rule is, therefore, is altogether central to the operation of this entire "second-level" constitution, and here is what the text of the APA, Section 551(4), says (in relevant part): "'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ."

A prominent scholar has called this definition the APA's "most blatantly defective provision."[29] Why? As then-Professor Scalia explained:

> Since *every* statement is of either general or particular applicability, and since *everything* an agency does is "designed to implement, interpret, or prescribe law or policy, etc.," the only limiting (that is to say, defining) part of the definition [of a rule] is "agency statement of . . . future effect." This is of course absurd. It means, for example, that an EPA directive that a particular company must, in order to comply with existing law and regulations, install particular emission-control equipment at a particular factory is a rule rather than an order; that the proceeding looking to its issuance is rulemaking rather than adjudication

28. Administrative Procedure Act, 5 U.S.C. § 559 (2006).

29. Ronald M. Levin, *The Case for (Finally) Fixing the APA's Definition of "Rule"*, 56 ADMIN. L. REV. 1077, 1078 (2004).

> . . . . Such an analysis produces a categorization which is . . . contrary to the common understanding of what constitutes rulemaking . . . .[30]

What, then, is a judge to do when called upon to determine whether an agency output is a rule? Scalia's answer: "[I]t is generally acknowledged that the only responsible judicial attitude toward this central APA definition is one of benign disregard."[31] In other words, disregard the portion of the statute that says "or particular" applicability. Why? Because there is broad agreement that rules are comparatively general, not "particular," and this agreement prevails over the text of the statute in the process of deciding the law on point. Why? Because the alternative is "absurd."

But what, then, of the dignity of *this* piece of legislation, indeed, this foundational component of the "second-level constitution" that is to be disregarded, ignored, overlooked, marginalized, denied effect? Lest there be any question of softening or perhaps escaping this stark and startling result, there can be no serious doubt that it is exactly the original meaning of 551(4) that the "responsible judicial attitude" is said, by Scalia and those for whom he speaks, to have to reject,[32] even though it was enacted, as mentioned above, by a unanimous Congress, and one can even make considerable progress in speculating why that Congress included "or particular" in the definition.[33] When it comes to the APA, then-Professor Scalia was even willing to sketch "an entire hierarchy of technical justifications for departure from the original text."[34] The first mentioned is "the common-law power of the courts to supplement the APA . . . [a] justification [that] is rarely phrased so baldly by the courts . . . ."[35]

This, then, is Exhibit A for Vining's trenchant observation—which begins to clarify the meaning of his earlier claim that legislation is a "problem in law"—that "statutes . . . 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"[36]—including, as just noted, by the leading advocate of treating statutes according to their original public meaning. Fine, but we also need to ask whether evidence like this, assuming we could amass enough of it, can establish Vining's larger claim, to wit, that legislation is a problem in law—even (or especially?) in a legal system

30. Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 383 (1978).

31. *Id.*

32. *See* U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947).

33. The details are complicated, but the gist, in Gary Lawson's speculation, is that it has to do with ensuring an exception to the otherwise absolute right of cross-examination for ratemakings.

34. Scalia, *supra* note 30, at 389.

35. *Id.*

36. VINING, *supra* note 3, at 227.

dominated by legislation. Before answering, we need first to follow another lead Vining lays out.

III. RULES IN LAW

Among the reasons I chose the particular example with which we have just been working is that the statute in question is a *rule about rules*, and rules, like legislation itself, enjoy an *instructively* contested place in legal analysis and jurisprudential discussion. To pick just one example, in the most-discussed book in Anglo-American legal philosophy in the twentieth century, H.L.A. Hart's *The Concept of Law*, first published in 1961, the central thesis advanced is that a "legal system" just is the union of *rules* of two kinds, viz., primary rules and secondary rules.[37] (Hart, of course, was opposing the Austinian view according to which law just is the command of the sovereign backed by the threat of punishment.) While Hart later conceded that he had overstated his case,[38] Justice Scalia has recently urged that we make the rule of law as much as possible a rule of rules. Justice Scalia contends that "[o]nly by announcing rules do we hedge ourselves in . . . . 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."[39] As Scalia sees things, the alleged boast of a rule—as opposed to a "standard," which is comparatively vague and open-textured—is that, first, it is comparatively precise and, second, it applies (or it does not) according to its own terms.

Vining, however, resists both the descriptive claim (Hart's) and the normative claim (Scalia's). As to the descriptive: "The distance of *The Concept of Law* from the reality of law was noted by those of us who read it as law students then, when it was new and before it became a text central to academic discussion."[40] The distance or dissonance concerns the place of rules in the unidealized practice of law. As to the normative, Vining does not mince words: "there is no such thing as a rule that exists or even has force in the mind."[41] What Scalia wishes us asymptotically to increase, Vining claims does not so much as *exist* in law, let alone admit of multiplication like loaves and fishes. The denial that there exist rules in law is one of the deepest and most recurrent currents in Vining's work spanning forty years.

But is not Vining's assertion, that "rules" of law do not even *exist* in law, overstated or even implausible? After all, in addition to Hart, other serious legal scholars have recently devoted substantial efforts to specifying

37. *See* H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994).

38. *See id.* at 255-63.

39. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180, 1187 (1989).

40. Vining, *supra* note 25, at 169 n.14.

41. VINING, *supra* note 3, at 239.

and defending the place of rules in our own legal system.[42] And even Judge John Noonan, whose pioneering work in *Persons and Masks of the Law* sounded a warning about how talk of rules is sometimes wrongly used by persons in law to obscure the persons the rules ought to be serving, not only admits the existence of rules in law, but commends them in unguarded terms: "Abandonment of the rules [of law] produces monsters."[43]

We shall return to Noonan's complementary recommendation—to wit, not to neglect persons—below. Before that, however, we need to press Vining and ask what he could possibly mean by the puzzling and apparently extravagant claim that there do not "exist" rules in law. There are several strands that need untangling here, in several stages.

IV. TWO KINDS OF RULES, NOT ONE

First, Vining notes, on the one hand, that "[l]awyers speak the language of rules, but when they engage in law and are observed to engage in law, their rules are nowhere to be found."[44] This is a variation on the contention that launched our inquiry in this direction in the first place: "[t]here is no such thing as a rule that exists or even has force in the mind."[45] Second, on the other hand, however, according to Vining: "Of course we do speak of legal rules and argue in the language of rules. It is useful to do so, an important part of mutual persuasion, a way of offering not just a vague suggestion but a finished product for serious consideration."[46] He continues: "But practicing lawyers and working judges know in their bones that while text can be closely read, including texts setting out 'a rule,' 'the rule' cannot."[47]

Third, while on his own account "rules" are not to be found in law, Vining readily acknowledges that elsewhere in life, as in chess and all those other activities we call games, there do exist rules.[48] A player must have them in mind if she is to play the game. Indeed, (skillfully) following the rules is *all* there is to playing games—because we, the makers of the games, have created them for just that purpose, as Vining observes.[49]

Finally, we all acknowledge the existence of the rules of which social scientists and natural scientists tell us. The ancients explained the cosmos

42. *See, e.g.*, LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES (2001); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991).

43. JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS 18 (2002).

44. Joseph Vining, *Theorists' Belief: A Comment on the Moral Tradition of American Constitutionalism*, 72 NOTRE DAME L. REV. 15, 23 (1996).

45. VINING, *supra* note 3, at 239.

46. Joseph Vining, *Propter Honoris Respectum: The Gift of Language*, 73 NOTRE DAME L. REV. 1581, 1587 (1998).

47. *Id.*

48. Vining, *supra* note 25, at 156.

49. *See id.*

in terms of various combinations of basic elements and, later, typically (though not universally), in terms of hylomorphism and teleology.[50] In the post-Newtonian period, however, we expect the world, both natural and social, to be explained in terms of rules. Scientists give us rules, and these rules are statements of the regularity of the world around us and even of parts of ourselves and of experiences we have. The etymological connection between rule and regularity derives from the Latin word *regula*, meaning rule.[51] At least by the fifth century, the Latin language developed an adverbial form of the word, *regulariter*, which referred to recurrence.[52] Rules of the sort scientists give us are reports of regularity.

Vining's denial that there are rules in law involves a multidimensional concern that law not be assimilated to—or colonized by—the world as studied by the natural and social sciences. Even Blackstone—no Legal Realist—was complicit in the conflation.[53] One dimension of the problem Vining fingers is the thought or contention that what we benightedly think of as the free and perhaps sometimes arbitrary (in the sense of willful, as opposed to reasoned) practice of law is in fact no more than one extended manifestation of a cosmic causal chain.

> The notion of a rule, insofar as law is associated with rules, is part of what would link law to the tyranny of nature over us, link law to gravity when we would leap, to blindness when we would see, to addiction and decay—law's essence residing in the imperative as such, its givenness.[54]

On this view, our human practice of law, in other words, would amount to no more than the functioning of what can be captured in (what Vining calls) a "total theory" in which we turn out to be just so many parts.[55] It is a fact of history that "Newton's philosophical adversaries objected to the

50. *See, e.g.*, R.G. COLLINGWOOD, THE IDEA OF NATURE (1960).

51. For a discussion of the path by which the word "law" also came to function as a descriptive term rather than a prescriptive term, see *infra* note 115.

52. *See* Jane E. Ruby, *The Origins of Scientific "Law"*, 47 J. HIST. IDEAS 341, 348 (1986). "Evidently at some point, regula itself, stripped of prescriptive connotations, took on the meaning of regularity (*cf.* today's 'as a rule') it has in Grosseteste and Bacon." *Id.*

53. VINING, *supra* note 3, at 21-22.

54. *Id.* at 240; *see also id.* at 20-22. It is not just *natural* science's knocking at law's door that worries Vining: "Into law—the most linguistic of disciplines, person speaking to person, individuals listening and speaking on behalf of persons—was imported the view that the discipline of law was a branch of social science. The American Academy of Arts and Sciences makes it such today, and academic lawyers post their online papers on the Social Science Research Network." Vining, *supra* note 25, at 151, 154. "[S]ocial science cannot escape its connection to the natural sciences and the premises or commitments of the natural scientist today." *Id.* at 154.

55. *See* Joseph Vining, *On the Future of Total Theory: Science, Antiscience, and Human Candor*, 1-30 (John M. Olin Center for Law & Economics, Working Paper No. 08-017, 2008); JOSEPH VINING, THE SONG SPARROW AND THE CHILD: CLAIMS OF SCIENCE AND HUMANITY 7-9, 14, 40-41, 43, 109 (2004). In the interest of averting a

absence of meaning or purpose in a cosmos that had no higher end than remaining in motion," but it is equally a fact of history that the Newtonian view took relentless hold on modernity.[56] Vining discerns in law a limit to the Newtonian explanation: "[L]aw stands in the way of science . . . . [L]aw stands in the way of self-destruction."[57]

In substantiating these claims, Vining does not simply deny the claim that all is process, nor does he oppose it by arguing from first metaphysical principles. Vining's response to this dimension of the problem is to offer "a phenomenology of law,"[58] pointing out, from every angle of the phenomenon he can discern, the ways in which the practice of law itself offers testimony against the mechanistic view of everything, including law and, indeed, ourselves. The reason law is thus "an object of amazement to the modern and postmodern mentality,"[59] as Vining maintains, is that law stands as an opposing witness against all of the claims made all around us on behalf (!) of the view that it's just physics, so to speak, all the way down (and up). "Law is the great overlooked fact in modern thought," Vining observes:

> Its true acknowledgment would threaten radical change, even among those whose articulated visions attempt to compete with both positivism, on the one hand, and positivism's enemy, historicism, on the other. With law enters personification, in the large and in the small, substance that does not ultimately become form or process, responsibility that goes beyond the existence of things. . . . Musical, mathematical, evolutionary visions of the ultimate ground of what is, become only partial visions, insufficient . . . .
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> . . . It is too often overlooked that law is evidence of view and belief far stronger than academic statement or introspection can provide.[60]

Vining's acute insight, which I think no one has articulated with greater subtlety, is that what we do in law is an extended demonstration that rules of science cannot come close to accounting for law: "Law pulls constantly away from science, because it is the companion of responsible action in which suffering is brought and responsibility taken for it, and suffering is experienced if action is not taken."[61] Again: "Law connects language to

possible misunderstanding, it should be said straight out that Vining is not "opposed" to science, only to its overreaching. *See id.* at 94.

56. *See* LOUIS DUPRÉ, THE ENLIGHTENMENT AND THE INTELLECTUAL FOUNDATIONS OF MODERN CULTURE 18-44 (2004).

57. VINING, *supra* note 3, at 207.

58. *Id.* at 357.

59. *Id.* at 110.

60. *Id.* at 3-5.

61. *Id.* at 31.

person, and person to action, through a form of thought that is not reducible to any other."[62]

Thus the first dimension: Not only is law not explained (or, rather, explained away) by the rules of science, law turns out to be a most impressive demonstration that we do not finally, because we cannot, treat persons as mere parts or phases of a causal process. Law is an extended demonstration that all is not process, that persons are initiators and not mere products.

The second dimension is related, and it concerns the ways in which we can, nonetheless, aspire to make law as much like science as possible by proliferating "rules" in law. Here there is no question of lack of existential freedom, only of what *sorts* of things we freely create to guide and channel that admitted, and sometimes threatening, freedom. Rules seem to be more reliable guides or channels than standards are, as this crisp example makes clear: "it shall be a crime to cry 'fire' in a crowded theatre" vs. "it shall be a crime to cry 'fire' in a crowded theatre if all things considered this was a dangerous thing to do." The practical preference for apparently more reliable points of legal reference was part of what was motivating Justice Scalia in his push for a rule of rules, of course, and that concern is by no means unique to him. There is wide, and indeed eminent, agreement that law must be reasonably predictable, else it will fail in one of its *essential* functions. Law that cannot be adequately pinned down such that you can act on the basis of it is a perverse and self-defeating reality. Whatever else it turns out to be, law is a guide to conduct.

Vining's further point, however, is that there is some deep illusion or deception at work in conceiving of law as—or aspiring to make law—primarily a matrix of rules. What is wrong with this conception or aspiration?

> [W]hy can't a "legal rule" become like a "rule" conceived within the terms of social science; why indeed is that not an ideal by the law's own lights, something graspable, predictable, "objectively" existing apart from the intentions, good faith, assent, and meaning of individuals and persons—like a rule of chess? Much of the answer, I think, is that life is not a game, despite what we all sometimes say about life.
>
> Life is not a game and law is not, however much contest is brought into law as a device in inquiry and reflection.[63]

What does this mean? Unlike the rules of physics, which are *descriptive*, the rules of a game and "rules" of law alike are, of course, *prescriptive*. We can choose to follow them, or not. The consequences of following or not, however, are not of the same kind as between the two sorts of prescriptive rules. Games and law, as no one needs to be reminded (except for the fact that so many serious arguments do try to understand law in

62. *Id.* at 357.

63. Vining, *supra* note 25, at 155-56.

terms of the rules of a game), offer our freedom fundamentally different kinds of results. "[G]ames, as games, are empty, and their emptiness is a source of their relief and pleasure, the unconflicted joy in the exercise of capacities they allow. It makes no difference what the outcome is, really."[64] "Life," however, Vining continues, "is not a game and law is not."[65] Life matters, to the extent that we know it is not exhausted by the rules of science. And law, therefore, matters; it matters to us whose lives these are that are not games.

Vining concedes that there can be a salutary aspect to talking in law in terms of rules, as we noted above. It is a way of communicating that what one is putting forward for serious consideration in a decision-making process is something that is the product of careful thought. Here, then, is how Vining believes "rules" actually function in law:

> "Rule"—sounding at once of authority, predictability, consistency, governance—and all that is put forth in discourse in the language of rules and changes of rules and exceptions to rules and violations of rules, will be seen by a lawyer to be but a way and only one way of seeking to convey what goes on in the legal mind in coming to responsible decisions.[66]

Rules, then, do not "exist" in law; they are but ways of talking about what is really going on in the quest to make law and to say what the law is.

Vining's contention is that, for all the talk of rules in law, the attempt at assimilation—either to science or to games—does not succeed, at least most of the time. In games, rules achieve what is claimed for them: a binary effect. In law, however, the rules are generated in and appear as parts in a methodical process that is not itself governed by any "rule" (or standard) of law that we have made. *Whether made by courts or by legislatures*, "rules" in law suffer—or rather *enjoy*—the same fate as legislation (whether the piece of legislation states a "rule" or a more open-textured standard): lawyers and judges work with them, interpret them, take them into account, perhaps ignore them—but certainly do not *just* follow them. "Rules are not self-executing, in law. 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. They focus not on themselves as a self-contained system but upon decision-making activity pointing forward."[67] If, in the end, the decision makers do "follow" the rule, this is not because the rule worked an inexorable impact on an unwilling mind, the way gravity works on our bodies that we would rather see soar. If this point seems obvious (and as one reads Vining it does seem obvi-

64. *Id.* at 156.

65. *Id.*

66. VINING, *supra* note 3, at 239.

67. VINING, *supra* note 1, at 218.

ous), Vining is not alone in seeing in many legal theories a desire for law that can run rail-like through our judgments.[68]

To conclude the present point with the aid of our earlier example, *the law* about what are rules under the APA turns out to be, when the analysis (as by Scalia) is over, to ignore *the rule* set out in Sec. 551(4) and environs. Vining saw this coming: "This is the overriding difficulty of statements of law given out in the form of 'rules,' always leaving out relevant considerations, and why such texts produce such tension when made central texts and, after a fashion, decay of their own accord,"[69] sometimes with the blessing of Justice Scalia, even in the case of a foundational component of a "second-level" constitution.

V. GUIDANCE IN THE PASSAGE TO LAW

So far forth, then, the picture seems to be this. First, duly enacted statutes are sometimes ignored, and no one cries foul. Second, "rules" of law are, like legislation, (generally) treated as reasons in a decision-making process, not bases for decision and action in their own right. Further, both of these perhaps surprising phenomena are in turn said to be *justified* as (necessary) parts of determining what the law is. There are so many contemporary examples of the fabled phenomenon that practitioners of law continue to treat statements of law, such as statutes, as *evidence* of what the law is, not the law itself—not just when faced solely with judge-made law, but also, as in the APA example, when statutes are in play. (Or perhaps it would be better to say that the "common law method" is indispensable to making law, even for one magnetized by a preference for the advertised ontological abstemiousness of the Scalia approach. I do not pursue this possibility here.)[70]

The question arises, though: Isn't this ignoring of duly enacted legislation and of rules itself the epitome of lawlessness? Is it not the substitution of caprice for antecedent law?

Vining's answer, which is framed in terms of legislation but applies *mutatis mutandis* to rules, is fascinating: "Legislation 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 which we use in determining what the law is."[71] The lawlessness, on Vining's account, is in the legislation (on account of its being "arbitrary"), not in what we in fact do with the legislation.

68. *See* Martin Stone, *Focusing the Law: What Legal Interpretation Is Not*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 31, 44-49 (Andrei Marmor ed., 1995).

69. VINING, *supra* note 3, at 188.

70. Is what is commonly called "common law method" the exclusive source of true *law*? *See, e.g.*, Joseph Vining, *supra* note 44, at 16. For a further discussion of this issue, see *infra* text accompanying note 92.

71. VINING, *supra* note 3, at 253.

But is not what we do with legislation itself arbitrary? Or, in the alternative, is what we do with legislation and rules itself subject to *law*? Vining does not, to the best of my knowledge, answer yes to this second question. We are led to ask, then: Is there room for a *tertium quid* between the two horns of this dilemma? In other words, if the process of "determining what the law is" is not law-governed, how can it avoid being just as arbitrary as the legislation whose arbitrariness we were worried about in the first place?

Vining has searching answers to these last questions, and these answers constitute, it seems to me, the heart of his alternative account of what we do in law. I find that account almost altogether persuasive. In the end, though, I am left suspecting that there is a piece missing from his *tertium quid*. Or perhaps what I perceive as an omission is only a terminological elision; Vining's avoidance of jargon and cliché is almost always a help. If, however, it turns out to be elision rather than omission, I would not wish to suppose that something important hadn't gotten lost sight of in the eliding.

A first cut at what Vining regards as governing (if the verb from which the gerund is derived is not question-begging in this context) the passage from statute or rule to law is *persons*. Not divine, angelic, or corporate persons, to be sure, but human persons or, as Vining sometimes prefers to call them, individuals.[72]

In one sense, of course, hardly anyone today would disagree with this. We are all "legal realists" now, as the cliché has it. Those of us who live after the jurisprudential episode known as Legal Realism, whose promoters acknowledged Holmes as the granddaddy of them all, are well acquainted with the fact (which I confess I doubt eluded Holmes's forebears), that law is made, interpreted, and applied by individuals essentially like us. Humans are not mere midwives to laws immaculately conceived elsewhere; we have a contribution to make, and are not mere conduits of what Holmes caricatured as that "brooding omnipresence in the sky."[73] Even Justice Scalia is quietly on board.[74]

At least some of the card-carrying legal realists, however, purported to discover in addition that the human contribution to the making, interpreting, and applying of law was to be explained—or, rather, explained away—*causally*. Vining refers to this as the "breakfast theory of justice—

72. This is the theme of Joseph Vining, *Donald A. Giannella Memorial Lecture: The Mystery of the Individual in Modern Law*, 52 VILL. L. REV. 1 (2007).

73. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting), *partially superseded by statute on other grounds*, Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (2006).

74. "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 the secret already knew it." DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 38 (2002) (quoting Justice Antonin Scalia).

the theory of the 1930s that what a judge does is determined by what breakfast he eats in the morning."[75] This turns out, ironically, to be the back door entrance to that tyrannical view of law, which we have already discussed from the front door perspective, according to which the rules are only those of science, what Vining elsewhere calls a "closed system" from which freedom is absent.[76]

> When at the end of one's search for law one finds oneself deposited in a small white room staring at a fried egg, one has the choice of giving up the enterprise, for one really has nothing useful or interesting to say and no one to say it to; or one can come out of the room and creep back to one's fellows.[77]

The fellows Vining knows, and believes we all know, in law, as elsewhere, are *persons*. One can use the italicized word and mean by it what the practitioners of the breakfast theory meant. Vining means something else by it, of course. That something, which is exactly not a *thing* or an *it* at all, is difficult to summarize, but we can approach it, as Vining does, by identifying what it is not. The human person is what is not explained—or explained away—by physicists, biologists, and those other theorists who would reduce us to equations. For such theorists, as Vining says, "love is the phenomenon of flesh on flesh, nothing more; a smile is a pulling back of the skin covering the teeth; dignity is measured by the relative angles of backbones."[78] But persons know better, and more.

At this level, there is *perhaps* very little one can say; better maybe is to appeal to experience, as John Noonan does:

> By [persons], I mean particular flesh and blood and consciousness. I take as a starting point that we are such beings . . . and that encountering them we recognize those who are in shape and structure, in origin and destiny, like ourselves. I assume that we have the experience of responding to persons.[79]

Noonan asserts—he does not argue—that human persons know human persons, and they are irreducible—and, if not ultimate, then certainly penultimate. Vining is in accord, and is here at his most pointed: "[T]he first and last thing we know, the ultimate object of knowledge and belief, is a person, not a principle. To a person, who is not merely a reflection of ourselves, we are not ultimately indifferent. This is what we know, what is real, what has meaning."[80] As Steven Smith says in his contribution to this symposium on the work of Joseph Vining, for Vining it is "persons

75. VINING, *supra* note 1, at 18.
76. VINING, *supra* note 3, at 76.
77. VINING, *supra* note 1, at 18.
78. VINING, *supra* note 3, at 144.
79. NOONAN, *supra* note 43, at 26.
80. VINING, *supra* note 3, at 201.

all the way up."[81] (The question to which I am coming is whether, for Vining, it is *also*, as it is for the Thomist, *law* all the way up.)

Persons in law say many things and make many things. They argue on the floor of the legislature, and before that performance is possible they make offices (such as president and judge and congressman). Mostly, though, they make texts. And when it comes time for any one of them to say what the law is, it will not, according to Vining, be solely on the basis of knowledge of a particular text or rule or *anything* else. It is on the basis of additional knowledge of a different kind, as Vining explains: "It is rather knowledge of living value, purpose, mind, intent."[82] It is knowledge, in other words, of the personal, but not in a completely free-form fashion:

> Disciplined pursuit of law-laden questions leads to legal texts but then through them and out again, as light is seen narrowing down to go through a lens or prism and then expanding beyond. Legal work on the texts is not a means of tracing out what the texts say, but of hearing the law. The law lives—exists—when it is heard, and it is heard through legal work.
>
> And here the connection with religion, the work to make law heard proceeds only on presuppositions. If it does not proceed on those presuppositions, it does not produce anything to which there is any sense of obligation. That which evokes no sense of obligation is not law. It is only an appearance of law, the legalistic, the authoritarian, not sovereign but an enemy. Principal among the presuppositions of legal work are that a person speaks through the texts; that there is mind; that mind is caring mind. These are the links between the experience of law and religious experience.[83]

Vining's *tertium quid*, then, which he sometimes thematizes as "legal method,"[84] seems to be this: The passage from legal materials to a statement of the law is governed by one person's caring for another person *as a person*, the caring mind of one person using legal materials (and whatever else is necessary) to speak the law to the mind of another person. A person's being able to speak thus to another bears what Vining calls "authority." "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."[85] In an alternative formulation of Vining's *tertium quid*, one might say that authority is the bridge for the passage from legal materials to a statement

81. *See* Steven D. Smith, *Persons All the Way Up*, 55 VILL. L. REV. (2011).

82. Vining, *supra* note 46, at 1587.

83. VINING, *supra* note 3, at 33-34.

84. For just one of dozens of examples, see *id.* at 145-46.

85. *Id.* at 32.

of law, and only persons, not things, can bear authority, only persons can be authoritative.[86]

In the block quote above and throughout his work, Vining considers the possibility that the stating and obeying of law merely *presuppose*, and do not depend upon, the work of persons. "There is the possibility that the presuppositions which must be entertained to do legal work," the presuppositions, that is, that there are caring minds at work and people to be valued and respected, "need only be working presuppositions, and that one can remain agnostic as to them to the end of one's life."[87] But is this correct, "the possibility" that it makes no difference to the obligatory quality of law whether it is made *by persons and for persons*? Vining is dubious: "Belief may be necessary to actual and actually experienced obligation and authority, to actual persistence in legal work that can lead to actual obligation and authority."[88]

Vining's context in what I have just quoted is a subsection of *From Newton's Sleep* entitled "Law and Religion," and Vining notes there the contrast between law that would operate by presupposition, on the one hand, and religious faith that believes, on the other. "What is the religious faith?" Vining asks. "In the West (and in the English language) the religious faith is that there is spirit and that life has meaning—or, as is sometimes said, that life is not existence only but is good, is a good."[89]

VI. LAWLESS MINDS?

Setting aside for the present occasion questions about the place of faith and belief in law, but focusing now on the "good," I would like to return one last time to the phenomenon we have been investigating from the beginning, which Vining captures as follows: "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."[90] If this is so, what then can we say about what goes on "in the course of arriving" at such a statement of law? It could, conceivably, be arbitrary. It could, at least in theory, be law-governed. Or, as Vining would have it, it is neither arbitrary nor law- or rule-governed; saying what the law is, is persons using legal materials, which are always linguistic, to treat persons *as persons* on the edge of lives that have never been led before: "Law connects language to

86. There would be vastly more to say here about authority and the authoritative if I were attempting anything approaching an adequate account of it. I have explored the topic in Patrick McKinley Brennan, *Locating Authority in Law*, *in* CIVILIZING AUTHORITY: SOCIETY, STATE, AND CHURCH (Patrick McKinley Brennan ed., 2007).

87. VINING, *supra* note 3, at 34.

88. *Id.* at 35.

89. *Id.* at 34.

90. *Id.* at 26.

person, and person to action. . . ."[91] To say what the law is, is to make a decision:

> Decision making consists of weighing purposes, values, factors, channels of thought. Rules are not self-executing, in law. 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. 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 must be made, at the edge of lives that have not been lived before, in a world that has not been seen before.[92]

This is beautifully said, and I believe Vining is right to trace law to *persons*, and within persons to *minds* bent on decision.[93]

But is that "decision that must be made" *lawless*? Is the deciding mind without the benefit of its own *law*? Or, in the alternative, are human minds, freely bent on decision, themselves ruled and measured by a *higher* law? There is no gainsaying that most modern thinking answers no to the third question. Indeed, this denial is nothing short of definitive of the epoch in which we live. As Remi Brague has recently observed, the project of modernity has been to reduce "the idea of law to a purely human phenomenon."[94] This is the background against which Vining, not to mention the rest of us, think about law.

Which is not to say, of course, that modernity amounts to a rowdy tapestry of moral relativism, nihilism, and prescriptivism; more or less rigorous moral theories of many kinds, such as Kant's and Bentham's, have had their say and sway, and with implications for human lawmaking. None of these, however, proffers an account of higher—that is, divine—*legal* governance of human persons. The denial of such governance follows necessarily for atheists and agnostics, of course, on pain of incoherence. Fair enough, I suppose, assuming the good faith of the agnostic or atheist. Among the remaining theists, the single most important altera-

91. *Id.* at 357.

92. VINING, *supra* note 1, at 218. "You never know, as a responsible decision-maker, what the rule of law is until the decision is made." Joseph Vining, *Fuller and Language*, *in* REDISCOVERING FULLER: ESSAYS ON IMPLICIT LAW AND INSTITUTIONAL DESIGN 453, 468 (W. J. Witteveen and W. Van de Burg eds., 1999).

93. "To be sure, there is legislation with its special claim to our respect. But other pieces of writing—and perhaps legislation too—exert their authority over us and command our respect and serious attention because and to the extent we hear a person speaking through them. Their authority rests upon the sense of mind behind them." Joseph Vining, *Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 248, 257-58 (1981).

94. RÉMI BRAGUE, THE LAW OF GOD: THE PHILOSOPHICAL HISTORY OF AN IDEA 238 (Lydia G. Cochrane trans., University of Chicago Press 2007).

tion in view in the modern period has been the new belief that God does not legislate for the rational creatures he has created. In the memorable words of Russell Hittinger: "divine providence is stripped of the predicates of law, [and we are left with] . . . , at best, . . . a creating but not a commanding God."[95] Or if God does command, He does so only in Scripture, not in his very creatures.

When one stops to think about it, though, the newly minted prospect that God created our free minds in a lawless condition is quite startling. The world to which the Deist would consign us looks like this. On the one hand, irrational, unfree creatures—such as puppies and petunias—would be infallibly moved by God through their created inclinations to their respective ends. Rational human creatures, on the other hand, would suffer their inclinations to their end(s), alright, but would enjoy no authoritative measure for freely achieving them. What this would mean, in other words, is that the creator created with the certainty that his rational creatures would not, absent divine intervention (as in Scripture), be commanded to the end(s) for which God created them. Created by God but not commanded by God, to vary Hittinger's phrase. Or, to vary the phrase yet again, no measures, or rules, or law imposed by another by which to choose and act. Kant celebrated the putative result as "autonomy." But is this true?

St. Thomas Aquinas faced this very question, of possible human lawlessness, already in the thirteenth-century, and reached a different answer. It would, of course, be uninteresting and otherwise unprofitable carefully to compare the jurisprudential commitments of St. Thomas and, say, Holmes; they come from totally different worlds, as Holmes intended. But Vining's jurisprudential investments, as Steven Smith and I (among others) have observed before, are intriguingly Thomistic in much of their substance, though certainly not in their terminology. Smith has suspected Vining, as have I, of being a crypto-neoclassicist in the jurisprudential tradition that runs from Aquinas through Fortescue, Coke, Hooker, and (to some extent) Blackstone.[96] For all of these jurisprudents and others like them, the *dispositive* legal fact is that the human mind is governed by a real divine law. Here, then, in terms, is Aquinas's direct answer to our question:

> [I]t was necessary for law to be divinely given to man. Just as the acts of irrational creature are directed by God through a rational plan which pertains to their species, so are the acts of men directed by God inasmuch as they pertain to the individual. . . . But the acts of irrational creatures, as pertaining to the species, are directed by God through natural inclination, which goes

95. RUSSELL HITTINGER, THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD 62 (2003).

96. *See* SMITH, *supra* note 19, at 45-48, 152-53, 170-74; Patrick McKinley Brennan, *Realizing the Rule of Law in the Human Subject*, 43 B.C. L. REV. 227 (2002).

> along with the nature of the species. Therefore, over and above this, something must be given to men whereby they may be directed in their own personal actions.
>
> . . . .
>
> [S]ince law is nothing but a rational plan of operation, and since the rational plan of any kind of work is derived from the end, anyone capable of receiving the law receives it from him who shows the way to the end. Thus does the lower artisan depend on the architect, and the soldier on the leader of the army. But the rational creature attains his ultimate end in God, and from God. . . . Therefore, it is appropriate for law to be given to men by God.[97]

The traditional name for this higher law is the *natural law.* We know it naturally, but its pedigree is divine. It is the higher law that governs free human minds as they go about choosing what to do and what not to do.

Libraries have been written about Aquinas on law and on the natural law specifically, but, for present purposes, the single most important affirmation Aquinas makes about law, in two parts, is that, first, the original instance of law, which in turn provides the definition to which all other putative instances can be compared, is the divine mind commanding creatures to the common good, and this is called the eternal law. Second, the natural law is not different from the eternal law, but is itself a "participation" or sharing in the eternal law.[98] The eternal law and its participation, the natural law, are the rules or measures of reason, promulgated by the one who has care of the community, for the common good of that community, and this, then, is the definition of law.[99] Law just is an ordinance of reason that comes from the ruler who has responsibility for the whole community, and comes from the ruler in order to move the community to the good that is common to the community. In sum, law is a rule or measure, first in the mind of the law giver, and then in the minds of the members of the community, for achieving that good.

Such terms as measures and rules, while generally foreign to our modern way of speaking and thinking about law and about the *deciding* human mind, are the ones St. Thomas Aquinas, and the tradition descending from him, employ, and they are complementary ways of describing the same thing:

> As stated above, law, being a rule and measure, can be in a person in two ways: in one way, as in him that rules and measures; in another way, as in that which is ruled and measured, in so far as it

97. ST. THOMAS AQUINAS, SUMMA CONTRA GENTILES III, c. 114. at 122-24 (Vernon J. Bourke trans., 1956).

98. *See* ST. THOMAS AQUINAS, SUMMA THEOLOGICA I-II, 91.2 c. and especially ad 1 (Fathers of the English Dominican Province trans., 1920) [hereinafter ST].

99. *See id.* at I-II 91.1 c. and 90.4 c.

> partakes of the rule or measure. Wherefore, since all things subject to Divine providence are ruled and measured by the eternal law, . . . it is evident that all things partake somewhat of the eternal law, in so far as, namely, from its being imprinted on them, they derive their respective inclinations to their proper acts and ends. Now among all others, the rational creature is subject to Divine providence in the most excellent way, in so far as it partakes of a share of providence, by being provident both for itself and for others. Wherefore it has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end: and this participation of the eternal law in the rational creature is called the natural law. Hence the Psalmist after saying (Ps. Vi.6): *Offer up the sacrifice of justice*, as though someone asked what the works of justice are, adds: *Many say, Who showeth us good things?* in answer to which question he says: *The light of thy countenance, O Lord, is signed upon us*: thus implying that the light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing else than an imprint on us of the Divine light. It is therefore evident that the natural law is nothing else than the rational creature's participation in the eternal law.[100]
>
> . . . .
>
> Human reason is not, of itself, the rule of things: but the principles impressed on it by nature, are general rules and measures of all things relating to human conduct, whereof the natural reason is the rule and measure, although it is not the measure of things that are from nature.[101]

These dense passages, which are some of the principal canonical texts in the tradition of theorizing about the natural law and which give new meaning to Vining's phrase "the legal mind,"[102] cry out for an extensive analysis and explanation. Sufficient to my present purpose, of ferreting out the Thomistic elements in Vining's jurisprudence, is to note, without elaborating, several provocative points of contrast or agreement.

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100. *Id.* at I-II 91.2 c.

101. *Id.* at I-II 91.3 ad 2.

102. I've long puzzled about how to answer Vining's question about whether law has its "own ontology." Joseph Vining, *Law's Own Ontology: A Comment on Law's Quandary*, 55 CATH. U. L. REV. 695 (2006). The answer, I think, is that it does, and for the reasons I have developed here, specifically, that higher law is "in" us as a distinct reality. We are not laws unto ourselves, and we do not make laws except as giving specification or determination to that higher law in which we "participate." If Vining does not affirm this participation in a higher law, I am not sure what it would mean to say that law has its own ontology. On such a view, law is just one among the many artifacts we create that are explicable in the ways in which our other artifacts are (or are not) explicable.

First, for St. Thomas, and for the entire tradition of which he is the fountainhead, law just is a rule and measure, first in the mind of the law-giver, second in the mind of the one to whom it is promulgated and whom it obligates. The apparent conflict with Vining could hardly be more complete. Whereas Vining denies rules a place in law, Thomas *defines all law*, including the natural law, in terms of its being a *rule* or measure.

Second, the conflict may be only apparent, however. At the level of its most primary precepts, the natural law is that "the good is to be done and pursued, and evil avoided."[103] The good, which is always concrete, turns out to be the rule that governs all of human living and *a fortiori* human law-making. Human law-making is no exception to the requirements of the natural law. The ultimate legal rule that governs human law-making, then, is that the good be done and pursued, and *this rule* implicates none of the shortcomings of "rules" as fingered by Vining. The rule that is "the good" has all the particularity that Vining insists law must have; it leaves nothing out; it is always utterly concrete. Is *this* good? If it is not, it is not lawful. If it is, it is allowed by the natural law, and may even be required by the natural law. (From this last fact nothing follows necessarily about whether human law must be made to give it effect. Prudence, about which I have more to say below, will dictate the answer). If someone should object that "the good" is a standard and not a rule, I would reply, for present purposes, that human law-making is measured by a measure that is utterly particular: The good always is particular, which is not to say that some things are not always and everywhere against the natural law.

Third, the natural law is the discovered basis on which humans can frame laws for themselves. The process of making human law is always and without exception about implementing the requirements of—or, as St. Thomas says, giving determinate or specific content to[104]—the natural law, that is, about leading men and women to what is *good* (for them).[105] The terminology is different (Vining speaks of value, not goods), but Vin-

103. ST, *supra* note 98, at I-II 90.4 c. On the question of the different levels of natural law precepts, a question that needed be developed here, see R.A. ARMSTRONG, PRIMARY AND SECONDARY PRECEPTS IN THOMISTIC NATURAL LAW TEACHING (1966).

104. *See* ST, *supra* note 98, at I-II 91.3 and 95.2.

105. An important qualification/clarification is in order here. As I have argued at length elsewhere, this does not *entail* that judges are free to ignore the terms of their office and, therefore, make law in derogation from preexisting human law. Civil authorities may operate only within the terms of the power the community has delegated to them, since the duty to live lawfully, and therefore to see to it that adequate human law is created, belongs first and indefeasibly to its members. If a judge is called upon to enforce a wicked statute, whether he can act in derogation from it is then a question of what power he has been delegated. He cannot, of course, whatever the delegation, be a material cooperator in evil, which means that on some occasions he may need to refuse to proceed to judgment or recuse himself. *See, e.g.*, Patrick McKinley Brennan, *Delivering the Goods: Herein of* Mead, *Delegations, and Authority* 2009 MICH. ST. L. REV. 307, 312-19 (2009).

ing would, I think, roughly agree, though with a possible critical qualification to which I return below.

Fourth, legislation *per se*, then, far from being a *problem* in law, is the *model* of law, and here we come full circle. The eternal law, the natural law, and human law are all "law" according to the same definition: an ordinance of reason in the mind of the one who has care of the community, for the common good, and promulgated. If the piece of legislation is in fact "arbitrary," it is not the law; law just is a thing of reason for the common good. And the ruler's promulgating and people's receiving such *law* just is the situation in which a community is being ordered to its common good, and this, for the Thomist, is what creation is all about, what it is *for*. God is such a ruler, through His promulgation of the natural law; humans, too, can be such rulers, through their promulgation of rules that lead the community to its common good. The *common* good is not, again for a reason to which I am coming, a concept that animates or organizes Vining's work, though I suspect it of being just around the corner.

Fifth and finally, unlike the source of the eternal and natural law, the generator and promulgator of human law is not omniscient. When, therefore, the human legislator promulgates a statute, it can be defective. Thomas stresses the need for the legislator to be possessed of the proper form of prudence, but even a superabundance of regnative prudence cannot assure human laws that will serve the common good in every instance.[106] When St. Thomas develops, as he does, a fairly elaborate account of how laws are to be interpreted (according to the mind of the legislator)[107], of when individuals can be dispensed from the law (when it would benefit the common good)[108], and so forth, the contents of the account are predictable. Why? As the examples just mentioned indicate, for St. Thomas the answers to these jurisprudential questions—the equity of the statute, dispensation when the common good demands or suggests it, etc.—*follow from the nature of law* (and, to be sure, prudential decisions about how to realize it); they are not, as is sometimes supposed, accidents of history or legally-unguided choices of "policy."

This merits emphasis. The crux of the matter is that law is an ordinance of reason, not a piece of paper; the law is only "in" the paper metaphorically. To know law, is to receive something from the mind of the lawgiver. *In this sense*, law is indeed "*given* to the subject," a possibility Vining doubts.[109] But notice that coercion is no part of the Thomistic definition of law. Citizen-subjects are to be ruled by freely receiving and conforming to the ordinance of reason in the lawgiver's mind and

106. *See* ST, *supra* note 98, at II-II 47.8 c., 47.1 c., 50.1 c. "Future contingents, in so far as they can be directed by man to the end of human life, are the matter of prudence." *Id.* at II-II 49.6 c.

107. *See id.* at I-II 96.6.

108. *See id.* at I-II 97.4 ad 1.

109. Joseph Vining, *Generalization in Interpretive Theory*, *in* LAW AND THE ORDER OF CULTURE 1, 5 (Robert Post ed., 1991).

promulgated. Relatedly, they are not to *substitute* their own "understanding," as the textualist bids them, for the rational and promulgated will of the legislator. Vining is right that "there is always a 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."[110] To which temptation the reply is this: Strictly speaking, law is only "in" the mind, of the lawgiver and then of the person to whom it is given.[111] Law is what the lawgiver means and promulgates, and it is legally incumbent on the people to receive and be ruled by what was first in the mind of the legislator. In the words of St. Thomas: "[A] law is in a person not only as in one that rules, but also by participation as in one that is ruled."[112]

If we can say that for St. Thomas legislation is a problem in law, it is in the sense that it may sometimes or even often be difficult, in this fallen world, for legislators to form worthy laws and difficult for people to know them. The properly interpreted statute that in fact leads to the common good is not a problem in law; the statute that fails in that task, or fails to communicate the mind of the legislator, is indeed a problem in law. In the world as we know it and can expect it to be, there is no gainsaying the ampleness of the opportunity for miscommunication and misunderstanding. These issues deserve more consideration than the present occasion allows. The fundamental point, though, is that from the eternal law right down to the law of the Commonwealth of Pennsylvania, law is always and exclusively about the ruler's moving his subjects toward the common good, from one mind to other minds. And this is very good, not a problem, though it is inevitably a process fraught with the possibility of error.[113]

In sum, from the point of view of the Thomistic natural law tradition, the answer to the question we have been pressing, then, is yes. All human living, and *a fortiori* all human law-making, is law-governed, and without the slightest threat to human free choice, though in a way that I have yet to explicate. On the Thomistic account, although there certainly are and should be parts of life that are not ruled by *human* law, there are no lawless

110. VINING, *supra* note 3, at 240.

111. *See* HITTINGER, *supra* note 95, at 97.

112. ST, *supra* note 98, at I-II 90.4 ad 1. For one account of how the natural law comes to bind us, see PAMELA HALL, NARRATIVE AND THE NATURAL LAW: AN INTERPRETATION OF THOMISTIC ETHICS (1994).

113. Though in a different idiom, Vining is attentive to the ways in which in law, it must be *law*, not something less or different, that is being spoken from one mind to another. *See* Joseph Vining, *Generalization in Interpretive Theory*, 30 REPRESENTATIONS 1, 6-7 (1990). I am here bracketing the extremely important question of the knowing the contents of a collective (rather than a single) mind, a principal concern of Vining's *The Authoritative and the Authoritarian*.

pockets in creation. It's law all the way up, just as it is—if I may introduce the necessary complement *en passant*—grace all the way up.[114]

VII. CONCLUDING THOUGHTS

The contrast I have been sketching is between, on the one hand, Vining's proper and largely salutary skepticism and corrective concerning the operative place of rules in human law, and, on the other, Thomas's defining *all* law in terms of the very concept Vining seemingly rejects. What accounts for this contrast? Part of the answer is that Vining's worry—that persons and their minds will be dissolved away into the rules and laws of natural and social science—perhaps leads him prematurely to exclude the possibility that, not just in chess but in life, a ruler can deliver to another person a truly *binding* rule of conduct (in the form of a true law) without threatening human free choice. Talk of law and rules has, for almost five-hundred years now, veered, like a car out of alignment, in the direction of the laws and rules of physics, not those that would measure human freedom,[115] and, moving from simile to metaphor, the baby has exited with the bath water. Vining, however, fully alive to the exigence of keeping human freedom in the picture, perhaps overlooks or diminishes the possibility that sometimes those in ruling authority, whether God or man, do deliver legal rules that *both* respect human freedom *and* have a valid claim to bind persons (in their freedom). Is it possible, though, that Vining has not merely overlooked or diminished, but *sub silentio* rejected, this position?

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114. For a compendious summary of the theological and virtue-theoretic context in which Aquinas develops his account of human law, see e.g., MARIE-DOMINIQUE CHENU, AQUINAS AND HIS ROLE IN THEOLOGY 105-17 (Paul Philibert trans., Liturgical Press 2002) (1959).

115. "Originally meaning straightedge or ruler, *regula* had acquired early in its Roman use a second meaning of 'rule' in the sense of guideline or standard. Similarly, *lex* was used not only of government or jurisdiction but also of principles laid down by authorities or developed by custom for the practice of various disciplines." Ruby, *supra* note 52, at 347. Thus, both *regula* and *lex* had meanings that clustered around a guide or standard. Both refer to potential guides to human conduct. They do not describe conduct that can be predicted; they are rather prescriptive. Over time, however, both terms lost their prescriptive qualities, at least in some usages. The development of the meaning of *regula* was paralleled by that of *lex*: "In much the same way [as *regula*] *lex* shifted in meaning, as principles originally understood as set down by authorities or evolving through custom came to be perceived as more or less certainly, more or less completely, either ambiguously prescriptive-descriptive, or purely descriptive, free from all connotations of authoritative precept." *Id.* at 348. There is dispute about the timing and reasons for these developments, but, interestingly, there is evidence that the gradual and piecemeal transformations in usage of these terms stretch back to Roman times. In any event, "[b]y 1540 . . . all the familiar modern scientific uses of 'law' were in place." *Id.* at 357. Though it would take another century or more for law, as well as rule, to gain the currency the two terms have today in science, the stage was set long ago for the problematic Vining fingers.

If we suspect Vining of being overly cautious about the possibility of binding rules of law, we might in turn ask why Aquinas is so confident about their possibility. We might also ask, indeed, how *exactly* Thomas thinks humans can be obligated by a natural law—that is, *bound* by a natural law—without thereby losing their freedom.[116] I cannot develop the answer here,[117] but it is sufficient to my present purpose to indicate that Vining's exact worry—that being under a rule of law is inconsistent with human freedom—was anticipated by St. Thomas. In the words of one modern commentator, St. Thomas understood perfectly well that he needed to establish that "natural law exists in rational creatures in a different way than in irrational creatures and does not cancel free choice."[118] The key to Thomas's solution is, in a phrase, the *hypothetical necessity* that comes from the rational creature's being ordered, by virtue of his created nature, to his *due end*, an end he must freely choose (or flout).[119] The key to the classical position is that the rational creature is created with an end that he truly *ought*—"*debeat*"[120] is one of the usual Latin terms to express this notion of obligation—to achieve. Can Vining abide this notion of a created "ought"?

The Newton who figures in the title of Vining's perhaps greatest book gave us not only modern science, but, with it, a different cosmos. As Louis Dupré explains,

> Mechanism had begun as a scientific theory. It soon became a controlling concept for the interpretation of all reality, including life and, with some, of the mind itself. Thus it developed into a worldview, an ambitious attempt to capture all reality within a comprehensive, undifferentiated system ruled by identical laws. This worldview implied an all-encompassing determinism that threatened the very possibility of freedom . . . . Romantic opponents of Enlightenment culture rejected the mechanist worldview (none more vehemently than Blake). But many retained its subjacent naturalism, including the idea that humanity becomes crushed by nature. Individuals may resist, but in the end nature smothers their futile efforts.[121]

116. *See* ST. THOMAS AQUINAS, QUAESTIONES DISPUTATAE DE VERITATE 17.3 [hereinafter DE VERITATE].

117. I pursue this in my forthcoming book (tentatively titled) THE SOVEREIGNTY OF THE GOOD: AN ESSAY ON LAW, AUTHORITY, AND GOVERNMENT (forthcoming).

118. Clifford G. Kossel, S.J., *Natural Law and Human Law*, *in* THE ETHICS OF AQUINAS 169, 184 n.20 (Stephen J. Pope ed., 2002).

119. For the starting points of St. Thomas's position, *see* ST, *supra* note 98, at I 82.1 and DE VERITATE, *supra* note 116, at Q. 17, art. 3.

120. *See* ST, *supra* note 98, at I 21.1 ad 3; I-II 99.1; II 44.I.

121. DUPRÉ, *supra* note 56, at 25. The story of scientism's threats to the possibility of jurisprudence, stretching back to the pre-Socratic period, is told in exquisite detail by DONALD R. KELLEY, THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION (1990).

If we begin, *contra* Aquinas, from the modern assumption or conviction which is the hallmark of that new cosmos, that the human creature has *no due end*, we will hardly be in position to conclude that the creature is free *yet bound*.[122] Crushed by the "breakfast theory" writ large, that is the end of the matter. Which cosmos is Vining's?

As we observed, Vining reached the conclusion that "the religious faith is that there is spirit and that life has meaning—or, as is sometimes said, that life is not existence only but is good, is a good." But St. Thomas, while certainly believing that what God created *is* "very good" (Genesis 1:31), also affirms that the good—our due end—is something to which we are bound by a natural *law*, which is knowable, at least in principle, by human reason. The natural law is, indeed, exactly the law that commands us to achieve our due end, what is *good* for us. The good not only *is*, as a transcendental property of being, but what *ought be to be done*, "for the essence of good consists in this, that something perfects another as an end."[123] Being free *yet bound* depends on our having an end, a good, that we *ought* to achieve. "Value" doesn't *quite* rise to the occasion.[124]

Which is why, in the end, Justice Scalia just may be right that "Vining (with appropriate disclaimer) is about as far as one can go without offending the [academic] proprieties."[125] That is already a long, long way. It might be too much today to proceed, as the *Liber Augustalis* did, from the premise that "[a]fter Divine Providence had formed the universe, . . . [God] put [His rational creatures] under a certain law . . ."[126] a law ordering the multitude to its common good. Alternatively, might that premise

122. "[D]oes not modern science instruct that there just is no teleology in nature, and hence even talking of anything like the natural ends or objectives or purposes, either of human beings or of anything else in nature, is simply ridiculous?" HENRY B. VEATCH, SWIMMING AGAINST THE CURRENT IN CONTEMPORARY PHILOSOPHY 282 (1990).

123. DE VERITATE, *supra* note 116, at 21, 2.

124. Does "transcendent" (Vining, *supra* note 25, at 167) come closer? Perhaps, though it seems to me to deflect attention from the fact that what is good for us, is good for us here and how, not just there and then. Vining tantalizes, though: "I am tempted to say that whatever may be thought generally of Creation, we each are created, for there is no other language of understanding that begins to reach us as individuals." Vining, *Mystery*, *supra* note 72, at 16. And again, from a different angle:

> The lawyers' problem is *the* problem. We will not solve it here. What we should see here is that within it is the problem of authority, and that it is linked to the problem of bureaucracy today and to the difficulty of the search by law today, as science is being put aside, for what it is, what it is for, what it is about, and what legal method should be. In the end, of course, the problem is a religious one. A question of meaning always is.

VINING, *supra* note 1, at 160.

125. Scalia, *supra* note 15, at 694.

126. LIBER AUGUSTALIS, *supra* note 7, at 33. *But see* ALASDAIR MACINTYRE, SELECTED ESSAYS: ETHICS AND POLITICS (vol. 2) 52-54 (2006).

be exactly what our day and time need above all to acknowledge and recover, an "object of amazement to the modern mind," an occasion, indeed, for a sip of Chartreuse?