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Asking the Right Questions: Harnessing the Insights of Bernard Lonergan for the Rule of Law (lead article)

Patrick McKinley Brennan

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ASKING THE RIGHT QUESTIONS:
HARNESSING THE INSIGHTS OF BERNARD LONERGAN FOR THE RULE OF LAW*

Patrick McKinley Brennan†

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"We cannot endow people with intelligence. Intelligence fundamentally is this capacity to ask questions, and this capacity is entirely from nature."†

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My concern here is the rule of law, in all its operations. I select the unexpected word "operations" in order to telegraph a difference from much other natural law jurisprudence. The rule of law is not just a battery of operations; however, failure to appreciate the place of operations in the rule of law leads to a straw-man rule of law—and we know too well the fate of straw men. It is flesh-and-blood men and women whose operations bring about the rule of law, if a rule of law

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† John F. Scarpa Chair in Catholic Legal Studies and Professor of Law, Villanova University School of Law, Villanova, Pennsylvania.

there is to be.

Conventional efforts to specify the conditions for the possibility of the rule of law seek to pile up the constraints on legal actors such as judges and administrators—the texts, the rules, the precedents. Such efforts play to Americans trained to insist that law is an *it*, a stable, even supine something or other. Almost everyone stands for the rule of law, and law—we are encouraged to believe—rules *ex proprio vigore*. Those who counter that the rule of law emerges from operations (of a certain sort) are suspected (or summarily convicted) of having renounced the rule of law in favor of power politics by another name. The discourse deteriorates further as those still bent on a rule of law thick with entitative restraints inveigh that law is an available something-or-other, not an operation; a noun, certainly not a verb; a roadblock, not an accelerator; a *corpus*, definitely not a *spiritus*. Operations and operators are exactly what we are told must be minified if law’s rule is to enter: The rule of law is achieved when law (a thing) constrains actors (operators) as they take decisions in the name of the law. Operations vs. constraints: this is the false dilemma that most often confronts those who inquire about the rule of law.

Behind the insistence-cum-hope that texts, rules, and precedents of our creation—for they do not come from on high—provide “constraints” upon our deciding and acting at law, a stunningly powerful current of thought surges. Martin Stone identifies it as the quest for the “rail that runs surely through our judgments.”

That quest manifests itself, as Pierre Schlag observes in an article titled *The Problem of the Subject*, in most of the “conventional problematics” of legal analysis:

- delimiting judicial review
- constraining interpretation
- confining judicial activism
- preventing judicial tyranny
- securing objective meaning in adjudication
- curtailing judicial discretion . . .

But what *is* there that can do so much? Can lawyers deliver the sought-after grail-of-a-rail? Does there exist law that is so objective—so object-like—as to (be able to) constrain human subjects acting in the

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name of the law? Joseph Vining answers in the negative, in terms that are hard to contravene: “[T]here is no law which anyone can take you by the hand and point to.”4 Steven Smith agrees with Vining, and adds that conventional legal practice continues, nevertheless, to look for—or, more frequently, to assert the existence of—a metaphysically thick rock of law, even as law’s theorists deny that such a thing can be found.5 We know that we live “[a]fter the [f]all from [m]etaphysics,”6 but “we endeavor to carry on as much as possible as though we had not discovered the [human] Subject” at the center of law’s rule.7

There will be much more to say about the multiple ways in which our forebears and contemporaries have conceived of what should constrain or measure our judging, deciding, and doing in the name of the law. But first it should be said that the unifying idea of the current essay is that—subject to a qualification reserved to the end—the final criterion of all our judging, deciding, and doing is that we satisfy the unrestricted desire to know that constitutes who we are. What I shall argue here is that the measure of our judging, deciding, and doing is found not “out there,” but within our rational self-consciousness. This is no rail, but instead that very part of ourselves that would bring us out of ourselves to affirm more and more of the real and the good. It is our primordial desire to know, manifested in our human intelligence as the pure question, that is our guide and measure. “[P]rior to the criteria of truth invented by philosophers,” observes Bernard Lonergan, “there is the dynamic criterion of the further question immanent in intelligence itself.”8

That criterion I shall refer to as inner law: It precedes, and asks to measure, all else that might come later, including especially what we do in the name of the law. The law of any community, I shall argue, is what is generated by and only by human operators faithful to the foundational operator that is inner law. For that desire, rather than something external to us, is our “natural law.” Failure to acknowledge the dynamic, inner source of the rule of law leads to dead ends: Texts and institutions, offices and practices that do not heed the true natural law of those whom they would make lawful can come to no more than variably successful coercions.

7. Id. at 240.
But this is to get ahead of the story. The alternative jurisprudence of the rule of law that I begin to sketch in what follows was inspired by the foundational work of Bernard Lonergan, S.J. (1904-84). Father Lonergan’s thought today enjoys an odd place in the life of the Catholic Church of which he was a member and of the larger Christian world, much as Father Lonergan himself did throughout his long career in a Church and world that did not know what to make of him. Though hailed by some as a universal genius, most have neglected him. Lonergan philosophized in neither of the two leading philosophic traditions of the twentieth century (viz., linguistic analysis and phenomenology), and a consequence of his bold differences has been his place at the periphery. Nonetheless, Lonergan has enjoyed the attention of serious students who have made their own original contributions. In theology and philosophy, including political theology and philosophy, among those writing in English, one can name David Tracy, Fred Lawrence, David Burrell, and Michael Novak. In the American legal academy, Lonergan has been appreciated and put to work by scholars such as Mary Ann Glendon, Thomas Kohler, David Granfield, O.S.B., and Robert Araujo, S.J.9 All of their applications and developments of Lonergan’s learning and insight, and this one too, depend on exploiting, above all else, one crucial fact about what constitutes us as humans:

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.10


10. See Lonergan, supra n. 8, at 9.
This dynamic spirit of inquiry both moves humans to know and measures the success of all efforts to meet that desire. Name it what you please, it is our inner law; not surprisingly, therefore, the creation of "law" in the sense we usually speak of it depends upon recognizing and giving effect to inner law's hegemony.

Mainstream jurisprudents will go on debating the question whether there is place for "dynamic" this-or-that in the rule of law, fretting over the whereabouts of the camel's nose, and insisting that there is a rail out there somewhere. What I wish to pursue is the alternative claim that, in virtue of how we humans have been made, first, a rule of law is possible, second, there is no credible alternative to its being a dynamic activity and achievement, and third, living lawfully is a matter of humans' succeeding in the inherently dynamic work of their own intelligent self-constitution. As Francis Cardinal George has observed, when law is devised and enforced without regard to who humans are (in potency), "law can only be experienced as an unintelligible restraint." By acknowledging and giving effect to the inner dynamism that is the pure question, in constituting ourselves and our communities as what they should be, we achieve a rule of law correlative to our dignity as free and intelligent, and always restless, seekers of the real and the good. Fundamentally, we need to decide to be operators of a certain kind—operators who individually and collectively satisfy the terms by which inner law works itself out.

Questions and questioning do receive some recognition and play some part in prevailing Anglo-American legal practice, of course. One thinks of the place assigned them by rules of evidence and procedure, of the judicial practice of identifying in the judicial opinion "the questions presented" for decision, and so forth. Other examples could be adduced. With rare exception, however, the assumption of those framing and answering the questions from bench and bar is that "the law," like "the facts," is already out there somewhere, the business of question-and-answer functions as a sort of midwifery for law that is just awaiting the moment of its unbloody entrance. Compounding practitioners' assumptions about law's emerging by a route other than question-and-answer are the mainstream epistemological and metaphysical canards that obscure the true springs of human lawfulness. Whatever its shortcomings as an accurate characterization of the tradition he opposed,

12. Gary Lawson, with his suggestion that what "the law" is has to be proved just as much as what "the facts" are has to be proved, is an exception awaiting development. Gary Lawson, Proving the Law, 86 Nw. U. L. Rev. 859 (1992).
Holmes’s parody of the “brooding omnipresence”\(^{13}\) succeeds inasmuch as it calls attention to the fallacy in imagining law for us as something (already) “out there,” whether it be rail or some other piece of cosmic “furniture.” In this vein, at least, Holmes might manage qualified agreement with Lonergan’s insight that even “truth is not so objective that it can get along without human minds.”\(^{14}\)

The train of thought that leads to what Holmes parodied is reversed as we discover how our asking (and answering) questions is in no way epiphenomenal to coming to know and create law for our human communities. Questioning is not sufficient, for we do need answers; but before we can have answers, we must ask questions. James Boyd White captures this: “It is a matter of having questions, and pursuing them as far as one can.”\(^{15}\) If we are to live as free persons, we need to learn and decide what shall be the law for us, and pursuing questions about valuable and worthwhile human living as far as we can is the necessary—though not the sufficient—condition of that learning and deciding.

Against this background, I want to suggest that we can make a most salient contribution to the improvement of the contemporary jurisprudential and legal culture by insisting upon the hegemony of the question in the project of constructing civil society. It is not enough to fight about answers or, say, what counts as a “public reason.” Before all else, the primacy of the question—the primacy of our being people who have a constitutive _eros_ for the real and the good—must be recognized and given effect, else we will have failed to realize our true selves and, moreover, the norms of our shared life will be constructed upon a sandy bottom and stunted by false ceilings. The need for a convincing response to legal realism and its aftermath is notorious; ostrich-like continuation of pre-realist, pre-lapsarian discourse does not withdraw realism’s sting. Whether a Lonergan-inspired approach can succeed where the traditional approaches founder, is a question for the reader to answer. A _jurisprudence of subjectivity_, as I shall call it, may not satisfy H.L.A. Hart’s “disappointed absolutist”\(^{16}\) who lurks in so many of us who crave to be brooded over by a lawful omnipresence or at least to

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15. James Boyd White, _The Edge of Meaning_ 101 (U. Chi. Press 2001). Some reservations about whether White in fact allows “the question” its full scope are raised at Brennan, _Meaning’s Edge, supra_ n. 9, at 2078-2083.
discover a rail running surety through our judgments. But there should
be some real satisfaction in recognizing how human subjects possessed
of their own intelligence can make themselves lawful by pursuing
questions as far as they are able.

What follows is divided into three Parts, the first two of which
comprise several sub-parts. In Part I, I sketch a phenomenology of
human knowing of both fact and value, highlighting the place of the
question in both motivating and measuring human knowing. The reader
who is familiar with Lonergan’s gnoseology may want to move more
swiftly through this Part in order to get to its “legal payoff” that is
unfolded in Part II; the reader to whom this gnoseology and the need for
it are utterly new will, by contrast, have made just a beginning. Making
the turn to the subject in law, without losing the possibility of
lawfulness, is not a day’s work—but at least Part I provides an
introduction to the place of the human subject in law. In Part II, I
identify certain aspects of the rule of law indicated by a jurisprudence of
subjectivity, relating them dialectically to a few of the insolubles
produced by the prevailing juriprudential doctrines that not only ignore
but sometimes deny the call of the question. Finally, in Part III, I
conclude with a word from the Catholic theological tradition, in which
Lonergan worked, about the operation of grace and caritas in human
subjects seeking and achieving law’s rule.

I. ASKING QUESTIONS, METHODICALLY

A. “Know Thyself!”

_Thoroughly understand what it is to understand, and not only will
you understand the broad lines of all there is to be understood but
also you will possess a fixed base, an invariant pattern, opening
upon all further developments of understanding_\(^\text{17}\)

—even, I would add to this programmatic quotation from Lonergan, of
law. We cannot possibly say how human subjects (can) do law before
we know something of who those subjects are, and of what operations
they are capable and to what effect.

Much Western philosophy is aligned with the common, unanalyzed
presupposition that human knowing—what humans do when they know
anything at all—is a simple act, something like using the eyes of the
mind to take a look at the so-called “furniture of the universe.”

\(^{17}\) Lonergan, _supra_ n. 8, at xxviii.
Intelligibility, meaning, and value are not furniture-like, however. As Bernard Lonergan, who stands tall among those who have identified the error in this reductive phenomenology of human knowing, notes:

[M]an observes, understands, and judges, but he fancies that what he knows in judgment is not known in judgment and does not suppose an exercise in understanding but simply is attained by taking a good look at the "real" that is "already out there now". [sic] 18

For the idea that knowing is a unitary act akin to ocular vision, Lonergan substitutes a phenomenology of human knowing as a compound of (potentially cumulative and progressive) acts. Those acts are, first, experiencing (through the five senses) and remembering and imagining; second, understanding and interpreting the contents of one's experiencing and imagining and remembering in hope of discovering the intelligibility latent within those contents; and, third, judging whether the proposed understanding/interpretation of that intelligibility is correct, probable, or false. It is not until the moment of judgment that knowledge can be reached: What comes before are merely experience and the experiencing subject's possibly correct interpretations of what intelligibility is to be found within the contents of her experience.

The tripartite compound of experiencing, understanding, and judging is—or, rather, is part of—Lonergan's phenomenology of human knowing. Lonergan's source for it was his own experiencing, understanding, and judging of his own conscious intentionality. Our current concern, however, is not someone called Lonergan. Bernard Lonergan entered upon his rest some twenty years back, and he did so having asked the living, in hope that they would learn how to live well, to advert to their own conscious intentionality in order to discover the structure and norms of their knowing. Though Lonergan expected that we would be able to verify with respect to ourselves what he verified with respect to himself, the issue ever remains personal discovery and appropriation, not deference to what someone tells you about yourself.

The crucial issue is an experimental issue, and the experiment will be performed not publicly but privately. It will consist in one's own rational self-consciousness clearly and distinctly taking possession of itself as rational self-consciousness.... No one else, no matter what his knowledge or his eloquence, no matter what his logical rigour or his persuasiveness, can do it for you. 19

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18. Id. at 412.
19. Id. at xviii.
The issue at hand is how we humans know what it is we know, and this is a question each must answer for himself. So, I would bid you advert to your own consciousness and try to determine whether you can verify the compound of acts Lonergan verified in his own. If you are not disposed to perform this private experiment, because, say, lawyers are after sterner stuff than touchy-feely introspection could ever deliver, alas we must part intellectual company—though I suspect that few can remain altogether self-composed while denying that we might do better if we knew ourselves better. It is my contention that all those concerned about law must start where we find law, if we find it at all—operating within our human intelligence. (True, one can imagine “law” that could enter human experience without its being verifiable in our human consciousness, but could such a Snark be law for us?)

We are approaching the question of how you know law from the angle of how you know, say, a sarcoma, a sunset, or a signal. So, I want to ask you, are you a knower? My question, you will notice, does not ask whether you know some thing—sarcoma, sunset, signal, or even statute. It asks, rather, that you make a concrete judgment of fact about whether you are now a knower; it focuses on whether you know, not on what you know. The question remains outstanding: Are you a knower? You might not be, in which case you will have nothing to say, because you will not have understood, among other things, my question. But if you answer “yes” or “no,” “maybe” or “maybe not,” you are a knower. Why? Because you could not (meaningfully) respond if you had not first known. Not only that. The fact of your response is itself evidence that you know through the pattern of operations I have described. Why? Because in the process of responding to my question, at the very least in seeing the black marks of my writing, you will have experienced; through questioning the contents of that experience and trying to understand my meaning, you will have reached an hypothesis or interpretation of the meaning of those marks on the page before you; and questioning that hypothesis/interpretation and concluding whether the evidence was sufficient to support it, you will have judged.

Argument of the sort I have just offered, the philosophers refer to as “transcendental.” Rather than bring in evidence ab extra, it capitalizes on your internal performance as a knower and on the prospect of pointing out operative self-contradiction, the contradiction that arises when you use your knowing to deny the very possibility of (your) knowing.20 The purpose of such argument is not to “prove” to

20. On transcendental argument, see the sources cited at Brennan, supra n. 6, at 275, n. 178.
you, in the sense of demonstrating a geometrical proof to the point of the Q.E.D., that you are a knower and that you do your knowing in the way I have described. Rather, my pointing out to you that prior to argument and quite apart from demonstration, you are a knower, and this thanks to a series of acts that you can verify in your own consciousness, is intended as an invitation to learn who you are and, then, (to continue?) to act accordingly. As Joseph Vining, whose work in law takes nothing from the pages of Lonergan but exudes deep appreciation of how our legal knowings in fact occur, observes wryly, “‘Know thyself,’ we hear suggested to us for our own good. We hardly know ourselves.”\(^{21}\) The whole of Joseph Vining’s jurisprudence can be understood as an attempt to reveal to us the better selves that emerge in what we do in law, even as our theories and theorists deny the very possibility of what we are doing, and of our better selves.\(^ {22}\) Operative contradiction remains a possibility, but why not let (successful) performance correct (bogus) theory?

To sum up, then, our progress in getting to know ourselves: I have suggested, based on my appropriation of my own cognitive operations, which align with Lonergan’s, that you can verify the same operations in your own consciousness. You may deny my claims; you may deny that you are a knower. Indeed, you may not be a knower. However, once you have experienced my claims, understood them, and denied them, you will have performed the very operations the occurrence of which you are denying.

The ultimate basis of our knowing is not necessity but contingent fact, and the fact is established, not prior to our engagement in knowing, but simultaneously with it. The skeptic, then, is not involved in a conflict with absolute necessity. He might not be; he might not be a knower. Contradiction arises when he utilizes cognitional process to deny it.\(^ {23}\)

B. Desiring to Know

But why bother to deny it? Because we cannot long stand the darkness. “One may be willing to play the buffoon, but one wants to do it intelligently.”\(^ {24}\) Not only does everyone except the imbecile realize

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21. Vining, supra n. 4, at 344.
22. Steven Smith reads Vining’s work similarly. See Smith, supra n. 5, at 171.
23. Lonergan, supra n. 8, at 332.
the stupidity of misunderstanding; more basically, indeed in our very
constitution, we desire to know. Aristotle began his *Metaphysics* with
the observation that “by nature all men desire to know”; Aristotle’s
mistake, if we may so bold, was in not taking this fact and its
consequences as his starting point for building a metaphysics, an ethics,
a politics. Platonism, by contrast, was “magnificent in its devotion to
the pure desire to know,” but threatened to frustrate that desire by
substituting an ideal heaven as its object.\(^{25}\) The fact of the matter,
verifiable in the operations of our own consciousness, is that we desire
to know, and what we desire to know is the real, not the imagined. To
our phenomenology of human knowing that identifies the tripartite
compound of experiencing, understanding, and judging, we add, then,
the eros that both assembles and structures those operations. Again,

[n]ame 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.\(^{26}\)

We are not inert. As living, rational beings, we are engaged in
experiencing, and, not satisfied with the impact of experiencing, we
want to understand and know what it is that we have first merely
experienced. As Lonergan says, we are committed to a world of fact,
not by first 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.\(^{27}\)

If identifying what liberates us from the confinement of pure subjectivity
as an “Eros” rankles in the ear and mind, it will have done its work. The
prevailing image of reason as an unmoved mover needs to give way to
recognition of the fact that we know because we *desire* to know. As
Thomas Kohler observes in this vein:

\(^{25}\) Lonergan, *supra* n. 8, at 366.
\(^{26}\) *Id.* at 9.
\(^{27}\) *Id.* at 331.
Try as we might at times to suppress or ignore them, questions about what events and experiences actually mean always surround us. In the stream of our lives, they constitute the steady undertow. These questions insistently invite us to go past the narrow world of our immediate, personal experience to consider what really is and what our answers might imply. These questions constitute the primordial, erotic drive that never can be entirely ignored and, when authentically pursued, leads to the formation and maintenance of community in the fullest sense.28

To follow Kohler to his conclusion, concerning community in the fullest sense, would be to get ahead of ourselves. Before coming to the particulars of the conditions of community and of legal community in particular, we need to probe further the power of the pure question. By “the pure question,” I mean the drive to know in all its scope, ever ready to issue in a new question. The reason the question is the key to unlocking the realm of being that lies beyond yet within the level of mere biological experience, is that the question is both a working out of the constitutive desire to know being (i.e., what is) and the measure of whether we succeed. Good faith questions are not idle inquiries into non-being; they go after the real; and it is exactly because the questions that issue from the desire for the real intend the real, that answers to those questions, in the form of the judgment, produce objective knowledge of the real. The hegemony of the question does not reduce us to, but rather liberates us from, the prison house of isolated subjectivity.29

28. Kohler, supra n. 9, at 62.

29. The objectivity of human knowing... rests upon an unrestricted intention and an unconditioned result. Because the intention is unrestricted, it is not restricted to the immanent content of knowing, to Bewusstseinsinhalte; at least, we can ask whether there is anything beyond that, and the mere fact that the question can be asked reveals that the intention which the question manifests is not limited by any principle of immanence. But answers are to questions, so that if questions are transcendent, so also must be the meaning of corresponding answers. If I am asked whether mice and men really exist, I am not answering the question when I talk about images of mice and men, concepts of mice and men, or the words, mice and men; I answer the question only if I affirm or deny the real existence of mice and men. ... The possibility of human knowing, then, is an unrestricted intention that intends the transcendent, and a process of self-transcendence that reaches it. The unrestricted intention directs the process to being; the attainment of the unconditioned reveals that at some point being has been reached. So, quite manifestly, a grasp of dynamic structure is essential to a grasp of the objectivity of our knowing. Without that dynamism one may speak of concepts of being, affirmations of being, even the idea of being; but unfailingly one overlooks the overarching intention of being which is neither concept nor affirmation nor idea....

Lonergan puts the point epigrammatically: “[g]enuine objectivity is the fruit of authentic subjectivity.”30 Because our subjectivity is structured and assembled by a desire to know that is limitless in its scope and satisfied by nothing short of the real, we can become objective knowers by operating according to the dynamism of our own subjectivity. It is because the human *eros* to know is “detached, disinterested, [and] unrestricted” that it is “[t]he immanent source” of our transcendence.31 Questioning does not merely rubber stamp what we first merely experienced: The satisfaction of that primordial drive moves us from mere interiority to affirm more and more of the real through grasp of its intelligibility. As we allow the pure question to bring us beyond the level of mere experience to affirm the intelligibility in what is given in experience, the question, as Lonergan says, is “the operator of [our] cognitional development.”32 Our cognitional life goes forward thanks to there being an operator, and inasmuch as that operator asks for the real and receives satisfaction, we transcend interiority, thereby becoming objective knowers. We achieve objectivity through, not despite, the *operations* of our subjectivity.

Of course, we subjects can be mistaken in our judgments; we can judge prematurely, we can fail to meet all the relevant questions, we can rest before the desire to know has been fully satisfied with respect to the experience at issue. Confidence in having attained knowledge in a true judgment is possible if, but only if, we have let all relevant questions occur; it is not enough to have allowed just the questions that happen to occur to us. Bias and other inhibitors of thorough inquiry threaten. Still, our ability to evade or suppress the pure question does not alter the fact that it remains the criterion of our knowing. Again: “[P]rior to the criteria of truth invented by philosophers, there is the dynamic criterion of the further question immanent in intelligence itself.”33 This is foundational insight of a jurisprudence of subjectivity rooted in the insights of Bernard Lonergan: That all human knowing, deciding, and living must be judged according to their satisfaction of that immanent criterion. Its satisfaction, one judgment at a time, does not allow us to

30. Lonergan continues:
   “It is to be attained only by attaining authentic subjectivity to seek and employ some alternative prop or crutch invariably leads to some measure of reductionism. As Hans-Georg Gadamer has contended at length in his *Wahrheit und Methode*, there are no satisfactory methodical criteria that prescind from the criteria of truth.


32. *Id.*

33. *Id.* at 221.
reach complete knowledge of the absolute; life is too short, and frequently we will be the victims of our own biases. But in a judgment that meets the demands of the pure question, we have reached “a limited absolute.” Such a limited absolute may seem a meager harvest, but it’s what we are capable of and it’s a far cry from mere nescience.

Although I have been emphasizing the exigence of dynamic operation on the part of human subjects trying to construct a rule of law (or anything else), one must not lose sight of the fact that we human subjects are passive with respect to the primordial emergence in us of the eros to know. We were made desiring to transcend our interiority through knowledge of the real (and the good). It is up to us whether we actively evade or actively meet that dynamic desire, but its self-assertion within us precedes and conditions such choice. Unless we are meeting that prior criterion, unless we can say that we have allowed and met all relevant questions as to the issue at hand, we cannot be satisfied that we know what is at issue. But if we have allowed and answered all relevant questions, we have every reason to conclude, and no reason to doubt, that we know what we previously were just curious about. Below we confront the problem of cultures that discourage or deny the call of the question; individuals’ life according to the question can be stymied by cultures and social orderings, such as a legal system, that settle for less.

C. Choosing to Know

The liberation that comes from living by the question is far from automatic, and this crucial point merits emphasis. As I just indicated in summary, though cultures can block such liberation, it ever remains up to us as individuals whether we actively evade or actively meet the dynamic desire to know. This is part of our self-constitution, and no one can do it for us. We cannot avoid experience, but our reaching the real in knowledge requires a choice: “[T]he real as intelligible is the product of a decision: a decision to accept as sufficient the reasons which support one’s claims to know.” The judgment in which knowledge is attained is the personal commitment of the human subject to the sufficiency of the evidence to support his understanding of what intelligibility is given in the data of his experience—his personal commitment to the fact that with respect to this (little) aspect of the real,

his desire to know has been satisfied. The turn to the subject reveals the error in the empiricist reduction: Experience is a beginning, but the rest is up to us and our choice to understand, and then judge, consistently with the pure question. As Joseph Vining puts the point: "[T]hat I understand you is something of a choice." Looking ahead, we can say that those creating and knowing law must be—if they are to be any good at it—people capable of making this personal commitment. If knowledge is to enter, passivity in the face of experience is not an option; knowledge enters by subjects' choosing to respond to the desire to know.

D. Method and Avoiding Angelism

Satisfaction of the desire to know occurs in the judgment, a limited absolute; but one judgment does not a wise man make. There is the further question, if we would allow it to occur; and it goes after what we have not yet known. If we allow the next question to occur, and do in fact meet its exigence, then progressively and cumulatively knowledge makes its "bloody entrance," one "limited absolute" combining with (or correcting) those "limited absolutes" already achieved. Before we advert to the fact, then, we are functioning methodically. By method I mean "a normative pattern of recurrent and related operations yielding cumulative and progressive results." The operations of our intelligence, always already structured and assembled by the eros to know, are a unity, both functional and functioning.

The operations . . . stand within a process that is formally dynamic, that calls forth and assembles its own components. . . . It is a unity and relatedness that exists and functions before we manage to advert to it explicitly. . . .

The success of that process is attested by knowledge that enters when one asks and answers questions not episodically but repeatedly and in light of past answers, revising where necessary but not assaying to start from scratch every time. Knowledge does enter, not thanks to self-certifying intuition (as Aristotle and Descartes thought), not by living (as Michael Oakeshott said of Descartes) as if each day is one's first, but by

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36. Vining, supra n. 4, at 17.
37. Lonergan, supra n. 8, at 186.
39. Id. at 17. The place of tradition in law, as a potentially self-correcting body of progressive and cumulative insights into valuable human living, is developed from a Lonerganian angle in Glendon, Knowledge, supra n. 9, at 119.
methodically asking and answering questions that lead to progressive and cumulative results. Method has a "normative force"; its imperatives will reside, not just in its claims to authority, not just in the probability that what succeeded in the past will succeed in the future, but at root in the native spontaneities and inevitabilities of our consciousness which assembles its own constituent parts, and unites them in a rounded whole in a manner we cannot set aside without, as it were, amputating our own moral personality, our own reasonableness, our own intelligence, our own sensitivity.  

Looking ahead, we can say that our intrinsic methodicality will need to shape our legal undertakings.

But first we should say more about our difference from the would-be Cartesian. In mediaeval learning, angels were understood to be created beings more powerful than mere humans but still short of divine power. Lacking bodies, they were denied sense experience, but they possessed mighty powers of intellectual intuition. "Their intellects," as David Tracy notes, "sound oddly like Descartes' model of human knowing." Angels and Descartes had in common that they learned alone and by intuition, rather than in community and through asking and answering questions. But "we humans," as Tracy further notes,

must reason discursively, inquire communally, converse and argue with ourselves and one another. Human knowledge could be other than it is. But this is the way it is: embodied, communal, finite, discursive.

In other words, our learning occurs conversationally, and conversation is not a series of soliloquies. It comes about thanks to an individual's or the group of interlocutors' allowing "questioning to take over. We learn when we allow the question to impose its logic, its demands, and ultimately its own rhythm upon us." We learn one judgment at a time, and the pure question keeps our horizon open and directed.

Even humans looking in good faith for law are not privileged to be angels, as James Madison made Federalist Fifty-One an occasion to observe; indeed, imporunate of law to live by in community, we stand face to face with our finitude and, if we are alert, our capacity to let knowledge enter by following methodically the call of the question.

41. Id. at 18.
43. Id.
44. Id. at 18.
Interdicting the operation of the *eros* to know is, in two words, lawless and unlawful. Lawless, because it amounts to an arbitrary act for which no reason appears; unlawful, because it violates the very call of the question that is (with the exception to be noted at the end) the fundamental norm governing us humans. "The critical spirit," as Lonergan observes,

> 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. It will recur whenever the conditions for reflection are fulfilled. With statistical regularity those conditions keep being fulfilled. Nor is that all, for I am involved, engaged, committed. The disjunction between rationality and non-rationality is an abstract alternative but not a concrete choice.⁴⁵

Lest emphasis upon the human subject's capacity to achieve the "limited absolute" mislead, two clarifications are in order. First, most of the fund of knowledge we rely on in our daily lives is not immanently generated by us. We absorb and affirm it *en bloc*, as it were; the intelligent course turns out to involve relying on that body of learning already amassed by our forebears, unless and until we have reason to correct it.⁴⁶ We can say about this body of "knowledge," which we take up without generating it ourselves, that we *believe* it to be true without knowing as much. I rely on maps that I have not created; I do not know them to be correct, but I do believe them to be correct. But this need to believe, rather than "know," much of what makes intelligent living possible does not cast doubt on the human capacity to reach "limited absolutes." Those who preceded us sometimes knew things, and we do well not to reinvent the wheel and the whole world of which it is a part. Second, not every judgment is a judgment that claims certainty. As I mentioned above, a subject can judge something to be probable, likely, very likely, etc. Though short of a claim to have reached a limited absolute, such a judgment, which might be all that is possible at the moment, far exceeds simple and unmitigated nescience.⁴⁷ As Mary Ann Glendon has stressed, what we can know about the concerns of law is more than a little fallible; most of the premises on which law proceeds

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⁴⁵. Lonergan, *supra* n. 8, at 332.
⁴⁶. See Flanagan, *supra* n. 34, at 228-229.
⁴⁷. See Brennan, *supra* n. 6, at 280-283.
are the probabilities generated through the operation of dialectic. This is reason to pursue the path of learning, not to abandon it.

E. From Knowing to Deciding and Doing

So far, we have considered human subjects and the method by which they become knowers of what is. But, what we know is not limited to what already exists. We also can know values or, to put it another way, what is good, worthwhile, worth our doing, worth our bringing into being. Moreover, we know what is worth doing in basically the same way as we know the real. We know, in other words, in a judgment that answers a question—this time, the question whether the evidence is sufficient to support a judgment that what is proposed (whether it be eating, fasting, building, or singing) is truly valuable in the circumstances. Judgments of value differ from judgments of fact inasmuch as our feelings can help us apprehend values; our feelings, however, are not themselves judgments; and until we judge, we cannot know. As Lonergan observes,

Judgments of value differ in content but not in structure from judgments of fact. . . . In both, the criterion [of judgment] is the self-transcendence of the subject, which, however, is only cognitive in judgments of fact but is heading towards moral self-transcendence in judgments of value. . . . [J]udgments of value state or purport to state what is or is not truly good or really better.

By judging correctly what is truly valuable, we are on the way to instantiating it. We are on the way to judging correctly when we are meeting the eros to know, which eros stretches beyond what just is, to what is good and worth realizing; and beyond again, actually to realize what has been apprehended as good or valuable.

Our culture of ethical non-cognitivism freighted inquiry into how we know the truly good or valuable with a burden that is hard to meet, let alone within the confines of a short essay. Here again in introducing a jurisprudence of subjectivity, I can only appeal to the reader’s own honest efforts to discern how it is you conduct your deciding and doing. The fool about matters of fact mistakes the real for the unreal; the fool about matters of choice and value ignores the good, and brings into being a person who actualizes the unvaluable. “One’s judgments of

48. See id. at 283-288, 299-305.
49. Lonergan, supra n. 30, at 37.
value are revealed as the door to one’s fulfillment or to one’s loss, and this is because the detached, disinterested, and unrestricted desire that structures and assemblies our knowing of the real and the valuable is not exhausted by our knowings. That same desire seeks to extend its influence from our knowing to our deciding and doing, making our doing consistent with our knowing. We ask about value in order to guide our deciding and doing; we can choose and realize the valuable only if we have first judged correctly.

Rather than belabor this point, which should make progress in minds familiar with choosing to do what is good and avoid its opposite, we should attend to an aspect of the human good, frequently overlooked, of great moment to politics and law. As the Scholastics put it, what is good, always is particular. The judgment of value must be, if it is true, a judgment of what is concretely good, because what is good merely in the abstract might be very harmful in the particular case. But though judgments of value must be judgments of the particular, the good—what is valuable for humans to realize—is not limited to the vital values that are good for humans one by one. The human good is not only individual; it is also social. Humans operate to realize individual goods, as when Adam who is hungry and alone picks an orange from a tree and feeds himself without benefit of Eve’s notoriously able assistance. Humans also cooperate; they work together to realize both individual and social goods. The manner in which cooperation is working itself out, Lonergan referred to as the good of order. It is the concrete structure of human interaction by which certain individual and social goods are realized. A system of distribution that gets bread to those who need it when they need it is, to that extent, a good of order. A legal system that sees that the guilty and only the guilty are punished is, to that extent, a good of order.

The slippery thing about goods of order, as compared to individual goods, is that we are not related to them by our feelings. You feel hunger, and this plays a role in your coming to judge that your eating

50. Id. at 39.
51. Lonergan’s appropriation of what is going on when we know and choose value is far more subtle than this presentation can suggest. A fine study of the development of Lonergan’s understanding of the root of ethics is Frederick E. Crowe, S.J., An Exploration of Lonergan’s New Notion of Value, in Appropriating the Lonergan Idea 51 (Michael Vertin ed., Cath. U. Am. Press 1989).
52. If the point is not at least plausible to the reader, nothing further that could be said here is likely to change his or her mind. But what is said here can be a beginning of a change of mind. See infra Part IV.
53. See Lonergan, supra n. 30, at 48-50; Lonergan, supra n. 8, at 596-598.
would be good. But we do not hunger, except metaphorically, for goods of order. The value of cooperative regimes must be apprehended and known without the help of feelings. Here the non-furniture-likeness of intelligibility is out in the open; knowing is a matter of grasping in judgment what cannot by merely experienced, even at the level of feeling. But once you and I have understood correctly (in judgment) that your and my and every other person’s eating when hungry is (all else equal) a good, and that your and my and everyone else’s eating regularly and reliably also is a good, we shall have known a good of order. Further, if we keep our knowing consistent with our doing, we shall decide to realize not just individual goods but the goods of order that proliferate and protect individual and social goods. This requires mounting from the level of experience to a judgment of a concrete good rooted in the real possibilities of a potentially emergent situation.

It is to be insisted that the good of order is not some design for utopia, some theoretic ideal, some set of ethical precepts, some code of laws, or some super-institution. It is quite concrete. It is the actually functioning or malfunctioning set of “if—then” relationships guiding operators and coordinating operations. It is the ground whence recur or fail to recur whatever instances of the particular good are recurrig or failing to recur.  

A (potentially) coercive system of ordering toward valuable ways of living (as, e.g., by enforcing just contracts for the baking of bread, as well as its reliable distribution) is a good of order, commonly called a rule of law, and it is to some of its contours, then, that I would like now to turn.

II. ASPECTS OF THE RULE OF LAW INDICATED BY INNER LAW

A. Foundations and the “Natural Law”

As I turn to indicate something of the rule of law that emerges when the subject who generates it is finally acknowledged as the particular sort of contributing operator she is and can be, I need first to say that if I have taken rather longer than you had hoped to address what you expected in a paper on the rule of law, perhaps I can be excused because I have endeavored to provide foundations that, even if already part of who you are, have been largely ignored and sometimes interdicted. Having been detained so long with foundations, I can only

54. Lonergan, supra n. 30, at 49.
be suggestive, but a series of pointers can indicate the power of recognizing the true source of the norms that can bind intelligent creatures in the name of law. As to some things we do in law, a jurisprudence of subjectivity simply makes better sense of them and gives them legitimacy they had lacked; as to other aspects, it invites change.

Before turning to those pointers, a sort of general observation, about where we have come from and are headed here, is in order. I have suggested how the pure question—subject to that qualification to be added at the end—sets the criterion for our knowing and doing, leading to knowledge of fact and value and to the realization of individual and social goods, including goods of order such as a rule of law. I have emphasized that whatever we have built already, and all our cooperations, remain subject to the pure question, which alone should be understood as the law by which ultimately (or, subject to that qualification to be added at the end, penultimately) we must live. Such permanent openness to new learning is strong medicine for those theorists and practitioners of law who, for any number of reasons, would have law be a closed system.

Likewise, jurisprudents who crave a univocal definition of law will cringe at the suggestion that the human eros to know the real, and to know and do the valuable, is—for crying out loud—law, natural law. It was Michael Novak who early saw the wisdom in identifying as the "[n]atural law" (Lonergan's retrieval of) the “operations of the human person unfolding according to their own inherent exigency,” and in it a way out of the false dilemma between relativism and absolutism that results from treating the natural law as a (static) cosmic code.55 Having zeroed in on that “prior criterion” that is the pure question, we can affirm the analogical relations among it and its derivative manifestations such as what we find in texts, in things themselves, in the minds that know those things, and so forth. With that “prior criterion” front and center, we are poised to observe that the different manifestations of what we refer to as “positive law” rise to the level of being a (community’s) binding norm only inasmuch as they are the product of (an assembly of) persons’ free submission to the “natural law” that would structure and assemble our knowing and choosing. There will be more about all of this in what follows. What I would emphasize now is that the achievement of Part II, if the reader agrees with it, is to enable one to

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conclude that—subject to that qualification reserved to the end—a posited norm that can bind our intelligence is the product of methodical fidelity to the prior norm that is the further question. It is alone obedience to the law of the further question that can produce law that leads to community in the fullest sense. How can it be otherwise, then, than that those who fail methodically to ask and answer questions lack standing to posit norms that obligate intelligent creatures?

B. The Inner Experience of Law

A first note of a jurisprudence of subjectivity is its “focus on the inner experience of the subject who is involved in the event of discovering, accepting and observing the law.”56 When law looks “largely irrelevant to the self,”57 as it cannot help but do when our starting points are rules or other artifacts rather than human subjects, law’s declension, desuetude, and disregard await no further explanation. The neglect and stifling of our constitutive eros for the real and the good lead to (putative) law that fails to meet our needs, what Cardinal George described as an “unintelligible restraint.” By attending first to inner law and then to its progress outward, to “the event of discovering, accepting and observing the law,” we expand the focus of jurisprudence from legislators or judges or executives and their deliverances, to the whole assembly of persons engaged in becoming lawful. Restless seekers of the real and the good do not live on freeze-dried “equal concern and respect” or “justice as fairness.” A jurisprudence of subjectivity—respecting Joseph Vining’s insight that the “question what the law ‘is’ is not so very different from the question what we ‘are’”—58 precludes law’s looking irrelevant to human selves. It respects the fact that we become lawful from the inside out, if we do so at all.59

A rule of law faithful to the jurisprudence of subjectivity is generated by and only by a method that takes its shape from the very

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58. Vining, supra n. 4, at 128.
59. As Joseph Flanagan observes:
To live freely, therefore, is not to live in an arbitrary way, but to live in the critically judged, critically evaluated way that you ought to live. The paradox of freedom is that to live freely is to live in an obligatory way. But it is you who obliges yourself. Your own intelligence obliges you, as does your self-evaluating self; you command yourself to be and to behave in truly worthwhile ways. In other words, there arises a spontaneous desire to maintain a consistency between your knowing and your doing.
Flanagan, supra n. 34, at 201.
method by which, individually and together, we human subjects learn what is good and how it is to be achieved. Legal method that leads to law for subjects such as we are is justified by its respect for the kind of operators we can be, and, if it is to enter, must be: not just experiencers, but attentive experiencers; not just interpreters, but intelligent interpreters of our experience; not just judges, but reasonable judges of our interpretations; and not just choosers, but responsible choosers of what we have first judged to be valuable. There is only slight oversimplification in saying that the legal method of Hart and Sacks\(^60\) was justified by its success in dividing and checking power and jurisdiction in order to provide orderly institutional settlements and arrangements. But such justification is not justification enough: The legal method indicated by a jurisprudence of subjectivity is justified by its allowing subjects to meet the unalienable duty, imposed by the pure question, to be seekers and doers of the good. Living by the question, far from leading to atomization (everyone asking his own questions and trying to answer them from within his own hermetically sealed black box), leads to the possibility and eventually the actuality (as Kohler\(^61\) put it) of community in the fullest sense. That is exactly because it indicates, over time, the power of methodically experiencing, understanding, knowing, and eventually valuing together, cooperatively. The law of the community emerges as the product of a whole assembly of persons methodically working out goods of order that allow the instantiation of other goods, social and individual.

A contrast may help to clarify this emphasis on the community’s role in law’s emergence. Thomas Aquinas’s definition of law (an ordinance of reason promulgated, for the common good, by the one who has charge of the community) rendered the legislator’s (reasonable) act to be law without regard to its reception by the community. Contemporary American legal culture focuses on courts, particularly the Supreme Court, as the oracular generators of welcome or dreaded law, with precious little attention to the significance of the non-reception of decisions so notorious as not to require mention by name. Having started with a phenomenology of the human subject’s knowing and choosing, however, and having thereby seen that all of us, at least potentially, are engaged in the life business of becoming lawful, we can conclude that neither (what we call) legislative nor (what we call) judicial acts nor (what we call) executive acts necessarily rise to the


\(^{61}\) Kohler, supra n. 9.
level of law. As Father Ladislas Örsy has emphasized in his application of Lonergan's insights to the canon law, the community's receiving or refusing to receive legislative or judicial or executive acts enters into the determination of whether what the legislator or judge or executive has given the community is a norm that should in fact bind the community.\footnote{Örsy, \textit{supra} n. 56, at 45-46.} In civil law as in canon law, it always remains a question, which no one can properly dismiss outright, whether such acts are in fact contributions to action (or forbearance) consistent with what we know to be valuable (or unvaluable). Decisions must be reached, but for them to be taken as they should, what has been handed down must be methodically received, understood, and judged in light of our concern for lawfulness in the present going forward. As Joseph Vining explains, "The content of the law, the obligation to obey it, and the specification of what obedience consists of emerge not one after another in the mind—or in legal analysis—but together."\footnote{Vining, \textit{supra} n. 4, at 246.} The priority of the subject, and his non-delegable duty to live by the question and its answers, assure that what emerges as law points forward to value to be realized.

While a conception of the rule of law that takes its bearings from cognitive method looks for law for the community in the overall community's engagement in questions about the true and the worthwhile, it bears emphasizing that this emphatically is not to say that everyone's being in the same boat (in the sense that no one is excluded from the call to look for and do the valuable) eliminates the possibility, let alone the exigence, of differentiated functions. It is up to the assembly who would become lawful to determine how to differentiate function so as to optimize opportunity to become people leading value-instantiating lives. That, of course, includes dealing with those within and beyond the community who would interfere with the lawfulness. In a community in which law is in fact emerging, everyone is a situated actor, situated as judge, juror, legislator, citizen, alien, executive, or the like.\footnote{See James Boyd White, \textit{Justice as Translation: An Essay in Cultural and Legal Criticism} 96 (U. Chi. Press 1990).} But whatever the correct distribution of function among roles such as the judicial, legislative, and the executive, \textit{they remain roles or offices in an undertaking the overall legitimacy of which turns on its contributing to the assembly of subjects engaged in meeting the non-delegable responsibility to the natural law}. Roles in a legal system are not platonic essences but instead "purposive institutional concept[s], whose content is a product of history and custom distilled in the light of
experience and expediency and—we must add to Paul Bator’s description—a commitment to realizing valuable ways of living in the community. Those who decide and act in the name of the law, not as citizens but as judges or legislators or executives or the like, are authorities in virtue of their office received from the community, but what we might call their authority—their capacity to bind subjects obedient to the pure question—depends on their being conscientiously responsive to the natural law. Office is a necessary starting point, but it is not sufficient. In designing a rule of law, then, we must anticipate that there will be an ongoing dialectic between, on the one hand, authorities in virtue of office, and, on the other, their success and the whole community’s meeting the demands of the inner law. But not only roles, but “the rules,” too, must be subordinated to the fundamentally lawful purposes of their generators and beneficiaries. Again, Joseph Vining neither overshoots nor undershoots in his observation that

[i]t 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.

C. Meaning, True Value, and Culture

Cognate with the constitutive role of the community in receiving a posited norm is another significant note of a jurisprudence of subjectivity. Through the decisions we make, each of us, as Lonergan says, is writing the one and only edition of himself or herself. But our decisions do not affect just ourselves. In various but frequently invisible ways, our individual decisions shape the culture we share and it in turn shapes us more than we shape it. By “culture” I mean the matrix of

meanings and values that provide us the reasons for what we do. Here, before saying very much, one must say bluntly that the very question of the value of a culture is itself victim of this culture of ours. Our culture often engages in a kind of wish fulfillment that actors living under the spell of Enlightenment reach what unimpeachable decisions they reach in splendid intellectual isolation. Our culture similarly denies that the obtaining matrix of meanings and values has much, or anything at all, to do with what we can make of ourselves as human persons. When culture does come up, frequently the inquiry is limited to anathematizing so-called “popular culture” and to sacralizing culture of the “high” sort, and we overlook that what we need is culture, shared meanings and values, which lead to worthwhile living all week long, not just to what we encounter in concert hall or museum. Fra Angelico’s frescoes were life-sustaining at home on the walls of San Marco when the cells were occupied; it is possible that those frescoes continue to nourish seekers-in “on holiday.”

The possibility of appreciating culture for what it really is depends on appreciating meaning and value for what they really are. One of the fruits of the self-appropriation worked out in Part I is a grasp of how we know the real that is not physical. As we observed, the subject who is locked in at the biological level of human reality merely experiences, or rather fancies that he is merely experiencing, when in fact he is performing several interrelated operations. When he waxes theoretical or opinionated, he tends to limit the “really real” to what emerges at the level of experience: what can be seen, touched, etc. By contrast, when one appreciates that by moving from experience to understanding and then to judgment the subject reaches the real that is only latent at the level of mere experience, the way is opened to affirm with gusto the real in all its plenitude. Value is not something we reach in mere experience; we come to know and affirm it through performing the right operations in the right way; (in brief) grasping and then judging the intelligibility in what we first merely experience. I can hold and clutch a copper coin without grasping its value in this community; I can see and touch a person without reaching his value, a value that, whether I recognize it or not, infinitely exceeds that of the ape. Likewise with respect to meaning. We can gape at or touch the black marks on the page for a flash or a fortnight, but until we ask their meaning, we cannot know it. Knowing meaning, like knowing value, is a function of mounting up from the level of mere experience through understanding to knowledge of intelligibility in judgment. And, as we stressed before, none of this is easy, let alone automatic. As Lonergan says, “[h]uman living really is a
struggle for meaning, an effort, because meaning is constituent of human living.” And there is only slight overstatement in what Lonergan says next: “The effort to live is fundamentally the struggle for meaning.” The overstatement comes in Lonergan’s slighting, in this moment, how important it is to us that we discover and incarnate value.

Recognizing how meaning and value are real, and appreciating their respective roles in constituting fully human life, we are now in position to assess the importance of culture. “Culture,” as Joseph Flanagan explains,

is common to people at all times. While specific manners, customs, and beliefs are cultural variables, such schemes of meanings and values change genetically and dialectically throughout human history. What does not change is the fact that people must be born, grow up, eat, work, sleep, marry, dream, get sick, and die. These are the basic events of human existence, and they do not vary throughout history. What does develop and decline are the meanings and values that people give to these recurring human events.

He who takes his last stand on the apparently secure world that emerges at the biological level that is experience concludes that meanings and values are so much fluff. But once we decamp from the world of brute experience, we discover that things are not just what they appeared to be back down there. It matters what they mean to us and what value they hold, and the meanings and values of the basic events of human life are transmitted through the culture we share. The world we live in is not just the physical world you experience; it is that “same physical world as a culturally mediated world of meanings and values.” Changing meanings and values, changing culture, changes the reality. The family is one of the examples Lonergan considered in this connection, and of course today it makes the point in a way Father Lonergan could not have imagined (except perhaps as a boring piece of science fiction). As Lonergan observed,

The reality of the family becomes a different thing when divorce becomes a common possibility. You have changed the meaning, and changing the meaning changes the reality because the meaning

70. Flanagan, supra n. 34, at 205-206.
71. Id. at 212.
is constitutive of the reality.\textsuperscript{72}

When both the at-will union of someone with someone else (or a brute beast?) and the life-long union of a woman and a man are thought and said to bear the equivalent meaning and value, the struggle for human meaning and true value has been frustrated. And so it is, as we have observed, that one’s judgments of value are revealed as the door to one’s fulfillment or one’s loss.

Now, the law of the community is a chief part, of culture, for law consists of the community’s shared, authoritatively administered, and coercively enforced meanings about what are valuable ways by which to live: Some but not other bargained-for exchanges, marriage as x but not y or z, certain kinds of corporate existence, schemes of compensation for particular kinds of harms inflicted but not for others, universal suffrage but not for “aliens,” condemnation and punishment only of those guilty of serious wrongs or those who have merely committed important regulatory offences, etc. Giving legal meaning to courses of action, law provides reasons for action that have as their intended consequence the creation of the good of order that encourages and supports valuable ways of living. If one overlooks or denies the reality of meaning, all that remains of what we call law is black marks on pages, decibels measured in an oddly decorated room, thugs carting you off to a cell or transferring your assets elsewhere—a social order that is just what it looks or sounds or feels like. If, on the other hand, we understand law in the way I have been commending, the black marks and decibels communicate meaning, and thanks to that meaning, what was a thug becomes an agent of law—so long, that is, as what he is up to contributes to truly worthwhile, valuable ways of living.

Culture is always with us, always influential; the decisive issue is whether the culture at hand contributes to its participants’ leading not only meaningful but worthwhile lives. For the reasons I have been developing, all of a culture, including what it posits as law for the community, remains subject to the transcultural norm that is the pure question. As I indicated above, cultures can, indeed must, be judged on the basis of the extent to which they contribute to their participants’ discovering values and leading worthwhile lives. But notice that, because part of leading a worthwhile life is living by the question,

\[\text{cultures may be judged valuable [exactly] insofar as they set the conditions under which authentic knowers and choosers may come to know and value themselves precisely as knowers and}\]

\textsuperscript{72} Lonergan, \textit{supra} n. 69, at 202-203.
Individuals can block their own development; a deficient culture operates to stunt the possibilities of all those it touches, and it does so by anesthetizing intelligence. Among the very greatest lessons that accrue from critically appropriating the dynamism of our own intelligence is the realization that culture’s legitimate role includes encouraging our living by the question, methodically and with openness to new learning. An assembly of subjects under the authoritarian sway of judicial and legislative acts, even “democratic” acts, that block further learning about human potential, is the victim of bad culture. I return to this eventuality below.

What is to be said of a people trapped within such a culture? If we adopt Lonergan’s terminology, people who live by the question are authentic because they are true to the norm that is constitutive of us as intelligent knowers and responsible actors. Those who ignore or interdict the question—as to what is or what ought to be—are inauthentic because they are stifling the operation of the principle of their own growth and development. As for subjects locked within a culture that through law and other means blocks people’s living by the question (and therefore misjudges the meaning and value of life’s events and possibilities), to a certain extent they can only authentically realize the inauthentic—and there is, in this, an element of tragedy. But the tragedy is not (necessarily) complete, because, as Lonergan observes, we can and must struggle to correct what is wrong in what we inherit. “So it is,” says Lonergan:

that commonly men have to pay a double price for their personal attainment of authenticity. Not only have they to undo their own lapses from righteouness but more grievously they have to discover what is wrong in the tradition they have inherited and they have to struggle against the massive undertow it sets up.74

D. Avoiding the Authoritarian

With that sober perspective, I come now to the last note of a jurisprudence of subjectivity to be observed here. I have been arguing that culture and—or especially?—that part of it that is “law” ever remain subject to the transcultural norm that is the pure question. This refusal to dig in our collective heels might raise in some minds the spectre of

73. Flanagan, supra n. 34, at 200.
antinomianism that spells chaos, not ordered pursuit of the good. Obviously, this is not what I intend, but I need to say more. As we indicated above with the help of Joseph Vining’s insights, in law there is always a decision-maker: The point of law always is to influence decision. But though decision-makers have, as we have observed, a non-delegable duty to honor the pure question, we do not live alone and we do not start from scratch. If we are operating methodically, we inherit, and some of what we inherit turns out to indicate valuable ways of living. Because not all our guides to worthwhile living can be immanently generated, it is the mark of a self-aware and methodical culture that it develops, first, reliable ways of receiving and searching what is handed down, both values and meanings, and, second, reliable means of giving social and institutional effect to those meanings and values that are found to be worthwhile.75 Honoring the pure question neither entails nor allows “questioning everything”; it requires working out ways to create and live a dialectic that methodically consolidates gains while keeping the way open to new learning and correction. Rather than for the disappearance of the state and the dissipation of law, a jurisprudence of subjectivity calls for a polity, a political and legal structure, that serve subjects’ aspirations to develop and implement worthwhile ways of living. We humans need the good of order that is a legal system framed with an eye to the methodical discovery and orderly instantiation of the good. What form it will take depends on the particular conditions and aspirations of the community: Any good of order, as we saw, is just a concrete system of “if-then” relations that in fact lead to further goods.

To this point I have said nothing about the place of texts in the good of order that is the rule of law. This reserve has been a necessary consequence of my thesis that what we ordinarily refer to as “law” must issue—with the exception to be noted at the end—from obedience to the prior law that is operative within human subjects. But texts are not nothing, or at least they need not be—and ordinarily they have a central role in the emergence and sustenance of a properly methodical rule of law. It remains to say something of their role in our current, emergent legal system.

By following inner law, we can come to know the meaning of the texts of Augustine, Abelard, and Aquinas, texts intended by their authors (principally) to edify their readers, and of the texts of P.D. James, Agatha Christie, and Robertson Davies, texts intended by their authors

75. See Flanagan, supra n. 34, at 222-223.
(principally) to entertain their readers. Obedient to inner law, we can also come to know the meaning of texts produced not principally to edify or entertain but to guide decision and action toward value, as in the case of “legal texts.” When in good faith we approach a text for guidance in our living, this would be because we believe it to be the product of a mind or minds worth respecting. A people faithful to inner law will not long suffer living by sloppy or silly texts. We must wonder and inquire whether this text was the product of fidelity to inner law. Coming to know the purpose, the meaning, and the quality of what someone has written down requires that we pay attention to that text; interpret it intelligently, doing what we can to unearth the meaning its author meant to communicate; and judge our interpretation reasonably, ascertaining as best we can whether the evidence supports the proposed interpretation. In the end, there must be a personal commitment by the interpreter: His judgment is called for. Texts can assist, but cannot replace, the active process of inquiry, of asking and answering the right questions; approaching texts without the right questions or without the right standard of judgment is a recipe for collision. In insisting that legal texts are subordinate to the legitimate aspirations of their creators and interpreters, the fruits and demands of the phenomenology of human knowing worked out in Part I are at an apex; and they lead in a direction strongly opposed by currents in the dominant jurisprudence.

Justice Scalia’s well-known jurisprudence of textualism will serve as an example. His idea is that the rule of law just is a “law of rules,” the rules’ being woodenly what “the text” indicates. On the approach Justice Scalia would have the (federal) courts pursue, subjects construing a statutory text do not inquire after the “semantic intentions” of the authors, that is, after the real meaning of the very subjects whose words these are. Instead, the interpreting subject seeks to say what a generic reader of the original language at the time of its promulgation would have understood it to mean, the question of the meaning the language had to its generators having been ruled out of court. The effort is to shrink and petrify (the sources of) law. What Scalia’s textualist offers and enforces in the name of the law does not purport to be the construal or interpretation of a subject’s (or subjects’) meaning; he is

satisfied if he can give the “legal meaning.” The textualist finds dictionaries and quasi-statistical sources of evidence of past usage helpful. They seem sturdier, and certainly are more limited, than the open-ended minds that compile them and all the meanings such minds can create and share. From dictionaries’ probabilistic evidence of what someone might have meant by words and phrases, as well as from other sources, the textualist judge constructs a legal meaning for the text.

From the angle of the jurisprudence of subjectivity, we might say that there has been an illegitimate substitution. Subjects intelligently consulting and construing texts created by other subjects, both in order to guide and concretely structure living in pursuit of values, have been supplanted by subjects constructing meaning based on texts no longer approached or construed as the methodical contributions of other subjects to living in pursuit of values. From behind the veneer of judicial deference to text, there emerges, first, an activist judge constructing rather than construing meaning (while pretending to be passive), and second and worse, a judge whose activity is to sidestep, in the name of the law, the potentially progressive and cumulative product of subjects seeking meaning and value. Joseph Vining captures the objection to this: “Legal discourse is not a closed system. The meaning of texts is a real meaning. To the degree it is not, what is put forward is a species of tyranny.”

According to the jurisprudence of subjectivity, actions taken in the name of the law are legitimate inasmuch as they are the products of subjects (successfully) seeking to discover and give effect to meaningful, valuable ways of living. Subjects using texts to guide and structure their living toward meaningful and valuable ways of living will be alert to texts’ being the product of minds worth respecting, to texts’ being heuristic tools of our creation, not shackles and inhibitors of worthy human living. If a subject is to consult a text as part of this project, her doing so will be legitimate only to the extent that she is looking for meaning communicated by a conscientious mind (or minds). As David Tracy observes:

77. For an example of how this works out in a particular and notorious case, see Brennan, supra n. 6, at 305-318.
79. Vining, supra n. 4, at 76. See Brennan, supra n. 64 (arguing for the openness of legal discourse and system on the basis of the requirements of natural law and practical reason).
Texts are not dictionaries. In texts, words do not have meaning on their own. 80

* * *

We converse with one another. We can also converse with texts. If we read well, then we are conversing with the text. No human being is simply a passive recipient of texts. We inquire. We question. We converse. Just as there is no purely autonomous text, so too there is no purely passive reader. There is only that interaction named conversation.

Whenever we allow the text to have some claim upon our attention, we find that we are never pure creators of meaning. In conversation we find ourselves by losing ourselves in the questioning provoked by the text. We find ourselves by allowing claims upon our attention, by exploring possibilities suggested by others, including those others we call texts. If we want to converse with the author, that is another conversation. 81

Mary Ann Glendon doubtless is correct to conclude that

[our legal culture . . . explains why many American 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. 82

Still, we should observe that this bid to reduce law's modalities is "a proposal for radical reform," 83 masquerading as traditional legal business as usual. The reform, moreover, is one we should resist, for all the reasons we have been developing. Joseph Vining summarizes them as follows:

[T]here 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. 84

The misguided hope, as Vining says, is to make law "a closed system." 85 Those committed to living according to the inner law that is the pure question do not know a truly "closed system"; they remain open to

80. Tracy, supra n. 42, at 60.
81. Id. at 19.
84. Vining, supra n. 4, at 240.
85. Id. at 76.
where the pure question leads and the operations needful to go there. Walter Brueggemann makes the point by insisting that “law must always be kept as penultimate,” forever subordinate to the dialogue and questioning that assure justice in the end.\textsuperscript{86} Inner law subordinates all other manifestations of and contribution to law to itself.

Those approaching texts consistently with inner law will—subject to that reservation reserved to the end—practice a certain disciplined creativity. Confronting an array of text in order to be able to say, concretely, what the law is on a given point, the interpreting subject must be good at “reading.” Which really means being conscientious in attending to text(s), creative but disciplined in interpreting texts, reasonable in judging potential interpretations, responsible in deciding and taking action. A jurisprudence of subjectivity recognizes and in its various ways encourages the range of cognitive skills necessary to achieving a rule of law by “reading” a text, whereas a jurisprudence that ignores the subject cannot know what those skills must be. Further, it recognizes that the interpreting subject construes “legal” texts’ meaning in light of the fact that they are heuristics for determining how to live in a very complex world, a world that is in the process of emerging (or perishing). It is for this reason, as Vining says, that “Lawyers,” at least lawyers living by the call of the question,

\begin{quote}
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 on 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.\ldots 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.\textsuperscript{87}
\end{quote}

I have focused on the texts that we call statutes, but it should be observed that even the U.S. Constitution does not fix the modalities of its own construction. It falls to those who would use the Constitution as an heuristic and guide (to achieve worthy purposes, those set out in its

\textsuperscript{87} Vining, supra n. 4, at 75-76.
Preamble and others) to settle and shape, and re-settle and re-shape as circumstances require and allow, what the meaning of that text will be going forward. Conscientious commitment to live by the pure question is the ultimate control on what construction and argument will be allowed and credited; other controls are, and must be, mutable.  

If you remain tempted to disagree with this conclusion, recall David Tracy’s observation that “when literate cultures are in crisis, the crisis is most evident in the question of what they do with their exemplary written texts.” The disintegration or disappearance of a conscientious interpretive community, the unavailability of subjects who can be attentive, intelligent, reasonable and responsible operators—these conditions can invite authoritarian (ab)uses of text, the substitution of ipse dixit or a favorite dictionary for new learning. A developing culture, by contrast, works out sophisticated and reliable controls on the common methods for finding and giving effect to meanings and values that will structure and propel the community as a whole. Such controls, necessary and salutary both, are legitimate inasmuch as they are known to contribute to the emergence and sustenance of worthwhile ways of human living. Michael White catches the drift of this repugnance toward ongoing inquiry into the real and the good as the source of legitimate politics in his observation that the program of political liberalism is to “[s]top [h]istory—[b]y the [r]ules [—the rules of political liberalism].” The rules, which themselves are not the product of disinterested, unconstrained inquiry into the real and the good, are set beyond question; they are made ultimate, not left as penultimate. They are offered to provide a rail that runs surety through our political judgments. But stopping history by the rules is out of the question, so to speak—if, that is, we live in a way that is consistent with our constitutive desire for the real and the good. Living by the question, we should be capable of creating the good of order that is a legal system that keeps us on the way, through a complex and always dynamic dialectic,

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88. It bears repeating that this openness does not entail or even that everything is always up for grabs: People living by the question are methodical. See also Powell, supra n. 83, at 204-213 (summarizing the author’s judgment of what is currently “settled” in American Constitutional theory and practice, including the modes of argument that are allowed and disallowed). Much in the “jurisprudence of subjectivity” as I have developed it consists with the position set out by Michael Perry in Michael J. Perry, The Authority of Text, Tradition, and Reason: A Theory of Constitutional “Interpretation,” 58 S. Cal. L. Rev. 551 (1985). However, Perry’s position there does not recognize (the need for justification from) the transcultural norm that is the pure question.

89. Tracy, supra n. 42, at 11.

90. Michael J. White, Parisan or Neutral? The Futility of Public Political Theory 81 (Rowman & Littlefield 1997). See id. at 81-121.
toward realizing meaningful and valuable ways of living.

III. CONVERSION AND CARITAS IN HUMAN HISTORY

The generation of Catholic thinkers that includes Jacques Maritain taught that the state, even a very good state, is not a sacral achievement, and the Second Vatican Council raised this learning about the laicized state to the status of Catholic doctrine. By now, we are accustomed to regard the state as an instrument, rather than the societas perfecta commended to our attention by earlier generations of Catholic thinkers. One wrong inference drawn from the state’s laicization is that the state is now the instrument of whatever citizens decide, rather than of the persons for whose benefit the legitimate state exists. Another inference wrongly drawn from the same laicization is that women and men living in civil society shorn of its sacral pretensions do whatever living they do there without benefit of anything sacred or holy or grace-filled and godly. The history of ideas that lead many among us to think that we live in a natural world apart from grace is complex, and in wishing to say something about it at the end, I need to say first that the error, which I must not by misadventure compound, is to imagine that grace, if it does enter to perfect nature (as the tradition teaches), does as much as a kind of afterthought, a “now for something totally different.” In approaching this topic, one does well to begin with a passage from Jacques Maritain (which Henri de Lubac quotes approvingly in his study of grace’s place in nature):

[A]t the time of . . . Descartes, it all happened as if thinkers who were still Christians had imagined a man of “pure nature” entrusted with philosophizing [.] to whom was superadded a man with the theological virtues charged with meritng heaven. Later [.] the non-Christian rationalists, more logical in maintaining the same error, were to reject as a superfluous duplication this man with the theological virtues.91

If it is a deficit of mainstream jurisprudence that it proceeds as if we children of Darwin go it alone, it is hard to deny that a deficit of much contemporary Christian jurisprudence is that it fails to observe how “nature” as understood by Christians is radically more than meets the eye of the naturalist. Jurisprudence is not theology, but a jurisprudence that does not reckon with what the (potential) operation of grace means for our hopes and fears, aspirations and failures operates in

a vacuum that can only run afool of what Christians believe to be the true destiny of this redeemed creation. John Finnis’s mighty study of Aquinas’s moral, legal, and political thinking makes room for grace only on page three hundred thirty-one, in the book’s last sentence, and there it enjoys only oblique entrance. Maritain, by instructive contrast, never or hardly ever loses sight of where and how grace is at work and, if we would allow it, transforms our expectations of a nature we might have imagined to be ungraced. The theology to which Maritain “subaltemnated” all his philosophy of politics and law is complex, but nearly everywhere it breathes confidence that the caritas that is God’s gift to all people, if they would just accept it, can transform not only persons but the world which they are called to make into a fraternal city. Maritain was full of hope that the juridical structures men were creating to realize that city of friendship and that love in action are being improved over time. Maritain was less hopeful that individual men and women were becoming any better: and at times, Maritain worried that the incidence of the expansion of freedom among men is decreasing as history unfolds. For Maritain, the critical issue remained that the love that is an infused virtue, from which no one is excluded except by his own refusal, makes possible and exigent what would otherwise be a mockable fantasy. We should set our sights high because we have been embraced by, and called to embrace, what exceeds our terrestrial hopes and energies.

Lonergan, who like Maritain contributed behind the scenes to the social teachings of the Second Vatican Council, was full of hope for the transformation of the social order. Lonergan, however, brings to bear on the analysis a sophisticated account of (what he refers to as) the “biases” that block social progress. This is not the place to explore these forces that a complete account of a jurisprudence of subjectivity would have to reckon with, but mention must be made of the fact, which Catholics and other Christians know in faith, that we do not walk alone even, or especially, in the face of our built-in misfires. So, I come to the qualification I reserved to the end. Ordinarily, we grow to live by the question by becoming more attentive experiencers, more intelligent interpreters, more reasonable judges, more responsible choosers—

92. “By the divine gift of somehow sharing in God’s life {per gratiam}, [friendship with God] can have its real beginnings here and now {hic in praesentii}, for any of us.” John Finnis, Aquinas: Moral, Political, and Legal Theory 331 (Oxford U. Press 1998).
building up through the four levels we have explored. Such conversions, as Lonergan calls them, are not achieved without considerable and sustained effort in which, no doubt, grace embraced is a real help. The avidity that emerges as the pure question always already aims beyond knowing to loving, though we can become conscious of this fact only if we have first known (the lovable).

Except, sometimes it happens the other way round. Some conversions occur from the top down, as when, we read at Romans 5:5, “God’s love floods our inmost heart through the Holy Spirit he has given us.” It is said that nihil amatum nisi praecognitum, but surely this truth is not meant to clip the wings of the Spirit that blows where it will. In deference to the Spirit’s acts and effects, Lonergan proposes the complementary truth, “nihil vere cognitum nisi prius amatum.” Being in love sets a new and effective first principle opening up new and hopeful possibilities. And, being in love, we become, in this order, responsible, reasonable, and intelligent about our experience and the possibilities it sets and the possibilities it rules out. The jurisprudence of the rule of law indicated by the insights of Bernard Lonergan asks the right questions and, unwilling to stop history by the rules, isn’t afraid of people who love, even in public.

95. See Lonergan, supra n. 30, at 107, 130-131, 338.
96. Biblia Sacra iuxta Vulgatum Clementinum (A. Colunya et L. Turrado eds., Biblioteca De Auctores Christianos Matriti MCMLXXV Septima editio (author’s translation)).