

Villanova University School of Law
School of Law Working Paper Series

Year 2007

Paper 79

A Quandary in Law? A (Qualified) Catholic
Denial

Patrick McKinley Brennan*

*Villanova University School of Law, brennan@law.villanova.edu

This working paper is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

<http://law.bepress.com/villanovawps/art79>

Copyright ©2007 by the author.

A Quandary in Law? A (Qualified) Catholic Denial

Patrick McKinley Brennan

Abstract

A contribution to the second law review symposium dedicated to Steven Smith's *Law's Quandary* (Harvard 2004), this paper asks whether the "quandary" in which Smith finds modern law and jurisprudence is not, at least in part, the consequence of misunderstanding the classical natural law jurisprudence. The paper advances an interpretation of natural law according to which the natural law is the human person's "participation" in the eternal law itself, with literally cosmic consequences for how we understand the ends and measures of human lawmaking. Mounting an argument against Justice Scalia's thesis that "God applies the natural law," the paper goes on to explore the consequences of the natural law's being, first, available to all rational persons and, second, capable of coercive implementation only according to the norms of positive law that respect the common good. The paper concludes that while we might be in an "ontological" quandary in law today, we are not – because we have in fact received the natural law – in an "ontic" quandary.

A QUANDARY IN LAW? A (QUALIFIED) CATHOLIC DENIAL

Patrick McKinley Brennan¹

I. Transcendence? In Law?

One of many fascinating facts about Pope Benedict XVI is that he has engaged many of the problematics that are the meat and potatoes of contemporary Anglo-American jurisprudence. Whether it knows it or not, the world faces a Pope who has written about the legal philosophy of Hans Kelsen, the political philosophy of Jacques Maritain, the ironies of Richard Rorty, and the significance of Karl Popper's philosophy of science for what one can reasonably expect people to hold as true in a pluralist democracy.² In sum, this is a Pope who has inquired deeply into "What keeps the world together: the prepolitical moral foundations of a free state."³

Law's Quandary was published only shortly before Joseph Cardinal Ratzinger was elected to the Chair of Peter, so one can safely assume the man has not read Steven Smith's jurisprudential gem. I suspect, though, that, given the chance, Benedict would join the chorus of praise Smith's book has stimulated, for at least this reason: Smith sets out to offer readers a forthright reckoning with the contemporary social, and specifically legal and political, situation that is the sort Benedict considers exigent. According to Benedict, "Demythologization is urgently necessary so that politics can carry on its business in a genuinely rational way."⁴

One of the principal tasks of *Law's Quandary* is to perform a "Socratic audit," or rather to invite the reader to perform his or her own "Socratic audit." The first question to be pursued by the auditor concerns the contents of his or her "ontological inventory," as Smith nicely names our operative-assumptions or convictions as what counts as real. What do we believe, affirm, judge to be real? The auditor next asks whether his working-list of what counts as real supports, or undermines, the claims he make? Finally, does it support, or does it destabilize, the claims we make in law? Smith refuses to be satisfied with, and invites the reader not to settle for, inherited understandings and justifications that are not up to today's tasks in law.

Readers of these law review pages cannot but be familiar with the bleak jurisprudential vision conjured by Oliver Wendell Holmes, Jr., the "high priest" of a new

¹ John F. Scarpa Chair in Catholic Legal Studies and Professor of Law, Villanova University School of Law. I gratefully acknowledge the research assistance of John Wagner.

² See, e.g., JOSEPH CARDINAL RATZINGER, VALUES IN A TIME OF UPHEAVAL 53-72 (Brian McNeil trans., Crossroad Publishing Company 2006).

³ See *id.* at 31.

⁴ *Id.* at 18.

“age of faith” in law, as Grant Gilmore described him with spot-on irony.⁵ “For Holmes, the ‘path of the law’ cut a horizontal line between heaven and hell, between human sanctity and depravity. Law served to keep society and its members from sliding into the abyss of hell. But it could do nothing to guide its members in their ascent to heaven.”⁶ Holmes’s dreary dream of the law to be produced by “the man of statistics and the master of economics”⁷ has gone unfulfilled, of course, but meanwhile the cynical acid has done its corrosive work in Holmes’s “well-known profession.”⁸

Among many in the mainstream today who continue to esteem law’s work, any “quandary” in law amounts to no more than the following: “How are we to meet the requirement that the law’s demands be defensible not as an expression of will, or power, but as a reasonable accommodation of the diverse needs and interests of people living together in a community?”⁹ The preceding quotation, from Lloyd Weinreb, is his re-statement -- his downsizing, if you will -- of law’s quandary. It trades on an ontological inventory that is lean indeed: reasonable accommodation, diverse needs and interests, people living together in community.

As fingered by Smith, law’s quandary is as follows:

Since at least the time of Holmes, lawyers and legal thinkers have scoffed at the notion that “the law” exists in any substantial sense or that it is not reducible into our discourse and practices. Law is not a “brooding omnipresence in the sky.” We have rejected any such conception of law . . . because we perceive, correctly, that our ontological inventories (or at least those that prevail in most public and academic settings) could not provide any intelligible account of . . . this “preexisting thing called ‘The Law.’” At the same time, . . . [there is] cogent evidence suggesting that we still *do* believe in ‘the law.’ . . . [O]ur actual practices seem pervasively to presuppose some such law: our practices at least potentially might make sense on the assumption that such a law exists, and they look puzzling or awkward or embarrassing *without* the assumption.¹⁰

The lightning that strikes in *Law’s Quandary* is the insight that *possibly*, just possibly, notwithstanding much – though by no means all – of what we *say* in law, in *doing* law we somehow experience what exceeds even the most reasonable accommodation, diverse needs and interests, etc., and this *doing* is strong evidence of what we actually believe. This is demythologization, not of a cynical and acidic sort, trades on the facts about our performance in law.

⁵ GRANT GILMORE, THE AGES OF AMERICAN LAW 41-67 (). See 1 JOHN WITTE JR. & FRANK S. ALEXANDER, THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE xxii (John Witte Jr. & Frank S. Alexander eds., Columbia University Press 2006).

⁶ *Id.*

⁷ See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

⁸ See *id.*

⁹ See Lloyd L. Weinreb, *Law’s Quest for Objectivity*, 55 CATH. U. L. REV. 711, 728 (2006).

¹⁰ STEVEN D. SMITH, LAW’S QUANDARY 62-63 (Harvard University Press 2004).

“It is too often overlooked,” says Joseph Vining in language Smith quotes, “that law is evidence of view and belief far stronger than academic statement and introspection can provide.”¹¹ Vining discerns that in doing law, we encounter the “transcendent.”¹² (If you have not read Vining’s *From Newton’s Sleep*, you should. Mary Ann Glendon’s blurb on the book’s jacket is exactly right: “Vining finds surprising treasures hidden in lawyers’ ways of knowing.” That the author of *Law’s Quandary* questions the authenticity of some of the “treasures” only enriches things). Commenting on *Law’s Quandary*, William Wagner explains that “Smith’s argument is mystagogical,” by which Wagner means that the argument “describe[s] and focus[es] the attention of each individual in his concrete existence on those experiences in which he in his individuality had the experience of transcendence and of being taken up out of himself into the ineffable mystery.”¹³ This demythologization is capacious.

Transcend and its cognates are nice inheritances from Latin, that unfortunately have been virtually bowdlerized in all manner of English-language Euro-speak that has little common ground with the Christian tradition’s teaching about the ways in which the person created in the image and likeness of God is capable of “transcendence.” Charles Taylor wrestled with this problem in an illuminating way in replying to a criticism of his use of the word “transcendent” in his essay “A Catholic Modernity?”:

How could I ever have used such an abstract and evasive term, one so redolent of the flat and content-free modes of spirituality we can get maneuvered into in the attempt to accommodate both modern reason and the promptings of the heart? I remember erasing it with particular gusto. Why ever did I reinstate it? Well, what pressure led me to reinstate it?

Well, one was that I wanted to say something general, something not just about Christians. In the end, I think there is a point one could make about the insufficiency of human flourishing as the unique focus of our lives, which recurs throughout all of human history and cultures, albeit in different ways. In this sense, there is something unique in our modern “secular,” Western culture, in that it is the site of the only large-scale attempt in human history at living an exclusive humanism. The self-congratulatory discourse about our exceptional status on this score is right in this respect: no one else ever tried it. And by virtue of living through this experiment, we will be in a better position to understand why. I needed a term to talk about all those different ways in which religious discourse and practice went beyond the exclusively human, and in

¹¹ See *id.* at 171 (quoting JOSEPH VINING, *FROM NEWTON’S SLEEP* 5 (1995)).

¹² See SMITH, *LAW’S QUANDARY*, *supra* note <, at 173. [10]

¹³ William Joseph Wagner, *Law’s Quandary: An Echo of the Infinite, A Glimpse of the Unfathomable*, 55 CATH. U. L. REV. 655, 657 n.18 (2006) (quoting KARL RAHNER, *FOUNDATIONS OF CHRISTIAN FAITH* 59 (1978)).

exhaustion I fell back on “transcendent.” (But I haven’t given up hope of finding a better term).¹⁴

Taylor is right: For those who do not wish to name God, count His commandments, or conform to the natural law, but nonetheless would like to live in a world that exceeds what we see when we look around, “transcendence” is a bespoke suit.

Smith is more linguistically parsimonious than Taylor or Vining; “transcendent” appears in *Law’s Quandary* only in *oratione obliqua*. Is the parsimony merely linguistic? Does Smith in fact pursue mystagogy, as Wagner suggests? There is no parsimony in mystagogy. However, Smith reports that he finds Joseph Vining’s “reflections” on how our practice of law points to and presupposes “something (or rather *someone*) transcendent” to be not “wholly persuasive.”¹⁵

Smith ponders and then rejects the possibility that we are in collective bad faith in law, like clergy who lost their faith but do not renounce their benefices.¹⁶ The alternative possibility, which Smith pursues, is that our practice is in good faith, while our philosophies limp. *Law’s Quandary* ends with this: “[W]e would perhaps be wise to confess our confusion and to acknowledge that there are richer realities and greater powers in the universe than our meager modern philosophies have dreamed of.”¹⁷ Smith is, then, a demythologizer, but only to a point. He certainly doesn’t describe or name what he counsels us to acknowledge.

The reader might wonder, then, whether she has by misadventure landed in the suburban neighborhood of those “flat and content-free modes of spirituality we can get maneuvered into in the attempt to accommodate both modern reason and the promptings of the heart.”¹⁸ Reading *Law’s Quandary*, Justice Scalia found himself “sorely tempted to leap up and cry out, ‘Say it, man! Say it! Say the G-word! G-G-G-G-God!’”¹⁹

The G-word and the real God it names would not as such resolve the quandary Smith discerns, however. Even assuming God exists, it remains a question whether He empowers mortal man to make law. God exists and ants live in impressively ordered colonies, but no one supposes that ants can legislate. I return to this below.

The reader will make up his own mind as to what, at the end of seven chapters and an epilogue, Smith has shown. I agree with Vining: “Smith’s book runs like a horse. It runs and takes us with it because there is such a voice in it, that brings us as readers closer to the subject of the search he undertakes, ‘performatively’ as it were.”²⁰ The argument from performance, and the threat of operative self-contradiction, is, though not

¹⁴ Charles Taylor, *A Catholic Modernity* 105-06 (1999).

¹⁵ See Steven D. Smith, *Metaphysical Perplexity?*, 55 CATH. U. L. REV. 639, 653 (2006).

¹⁶ SMITH, *LAW’S QUANDARY*, *supra* note <>, at 159-64. [10]

¹⁷ See *id.* at 179.

¹⁸ Taylor, *supra* note <>, 105-06. [14].

¹⁹ Antonin Scalia, *Review of Steven Smith’s Law’s Quandary*, 55 CATH. U. L. REV. 687, 694 (2006).

²⁰ Joseph Vining, *Law’s Own Ontology: A Comment on Law’s Quandary*, 55 CATH. U. L. REV. 695 (2006).

a panacea, frequently the strongest hold we have in law.²¹ It trades on the fact that, though one may like to play the fool, in the end, one likes to do things intelligently.²² Smith underutilizes the argument from performance, of which Vining is the master.

I find myself in complete agreement with Smith and Vining when they aver that our practice of law is not explicable in terms of post-Holmesian positivist commitments. I also agree with them that what we do in law is frequently better evidence of what we believe than is what we say. I find myself slipping off, though, or trying to reign in the “runaway steed,”²³ when the suggestion emerges that law, of the good old-fashioned, pre-Holmesian sort, is of a “substantial” sort.²⁴

Smith is cagey and, for the most part, non-committal about exactly how we ought to conceive of “the law,” that “higher law,” that he suggests is necessary if we are to make sense of what we do in law. What commitments he adumbrates, though, seem to me to be in the direction of something that is, first, too “substantial” and, second, at the same time, too “high.” William Wagner’s suggestion that Smith has in mind a kind of “transcendental positivism” is intriguing for its calling attention to Smith’s implicit demand for some-*thing* beneath or behind humans’ positing of law.²⁵

In common parlance, “substance” both connotes and perhaps also denotes a *res extensa*, a something that, because physical, is substantial, in the sense of sturdy. This train of thought that would limit the real to the physical, rules out love, value, meaning, and law, to boot. The classical tradition knew better, in ways I shall elaborate. What we do in law does not presuppose some kind of cosmic furniture that no longer appears on our ontological inventories. Nor do our legal practices require for their legitimacy that they conform to an “overarching reality,”²⁶ as Smith styles it. What our practices presuppose, rather, and what gives them what legal legitimacy of which they are capable, is much more ordinary, but still not simply (to vary Taylor’s phrase) what is exclusively human or (more technically) natural. Or so I shall argue.

What I shall argue, more specifically, is that, on the view of traditional Catholic philosophy, we cannot be in a true quandary or predicament in law, because – whether we readily admit it or fiercely deny it – we have received, and *therefore* can make, law. On the traditional Catholic view, it is a fact about who we *are* that we are capable of making law. While the Catholic tradition denies, then, that we are in an ontic (as opposed to ontological) quandary, it must and does acknowledge that our mainstream, “meager” ontologies can undermine and retard the possibility of our making the law of which we are capable. But in acknowledging the ways in which we are ontologically (as opposed to ontically) hobbled, and trying to help us overcome them, Benedict sometimes

²¹ See Patrick McKinley Brennan, *Realizing the Rule of Law in the Human Subject*, 43 B.C. L. REV. 227, 274-76 (2002).

²² *Id.* at 228.

²³ Wagner, *Echo of the Infinite*, *supra* note <>, at 662. [13]

²⁴ SMITH, LAW’S QUANDARY, *supra* note <>, at 62. [10]

²⁵ Wagner, *Echo of the Infinite*, *supra* note <> at 665. [13]

²⁶ SMITH, LAW’S QUANDARY, *supra* note <>, at 47. [10]

seems to flirt with an deeper quandary in law, a genuinely ontic quandary. Smith and Benedict converge in an unexpected way.

II. Practical reason and Venn diagrams

Driving Smith's suggestion that there remains more to law that Holmes allowed is the observation that, more than half a century after "the ostensible demise of *Swift v. Tyson*, lawyers and judges still in practice treat prior decisions as if they were evidence of something more subtle and coy and unitary – of 'the law.'"²⁷ Smith might have added that even statutes – the quintessence of modern law – are treated as evidence of what the law is, not as the law itself.²⁸ And the text of the Constitution, too, is sometimes treated as confirming legal realities that precede legal text altogether.²⁹ The resulting contention, then, would be that we practice law as if the practice depended on more than a selection among or interpretation of posited legal materials.

"At the heart of much modern legal thought," Smith observes, "has been the concern to address a central, ongoing challenge: the challenge of explaining how the law makes sense without 'the law.'"³⁰ Smith divides the responses to this apparent phenomenon – the persistence of lawyers' and judges' pursuit of law the lies behind or above the posited legal materials -- into two camps. The first affirms that Holmes's "well-known profession" is understandable in its own right; "[w]e can and should understand the legal enterprise on its own terms and with reference to its visible functioning – not importing any extraneous disciplines, and *a fortiori* not referring to any spooky metaphysical entities such as 'the law.'"³¹ Lloyd Weinreb would seem to agree.³²

The second response denies the claim that the legal enterprise is sufficient unto itself; "[t]he 'law and' strategy," as Smith calls it, considers that "[t]he law needs supplementation. . . . That substitute might be 'policy,' or 'policy science.' It might be moral philosophy. Or perhaps pragmatism, or judgment, or practical reason. In any case, the law is like the tango: it takes two."³³ Richard Posner thinks *Swift v. Tyson* was based on an epistemological error, but perhaps the positivism presupposed by *Erie v. Tompkins* turns out to be the error?³⁴

²⁷ *Id.* at 57.

²⁸ *Cf.* *Sugar Cane Growers Co-op. of Florida. v. Veneman*, 289 F.3d 89 (D.C. Cir. 2002) (holding, on basis of prior judicial precedent, that A.P.A. sec. 706(2)(A) is permissive), with *Checkosky v. SEC*, 23 F.3d 452 (D.C. Cir. 1994) (holding that same statutory provision is mandatory on its face).

²⁹ See Patrick McKinley Brennan, *Against Sovereignty: A Cautionary Note on the Normative Power of the Actual*, __ Notre Dame L. Rev. __ (forthcoming) (criticizing Supreme Court's *selective* departure from textualism in favor of "sovereign immunity").

³⁰ SMITH, LAW'S QUANDARY, *supra* note <>, at 65. [10]

³¹ *Id.*

³² See Weinreb, *Law's Quest for Objectivity*, *supra* note <>, at 711-29. [9]

³³ SMITH, LAW'S QUANDARY, *supra* note <>, at 65-66. [10]

³⁴ Richard Posner, *The Problems of Jurisprudence* __ ().

Smith observes, and I consider the observation (which he takes from Norman Cantor) to be mostly correct, that “[t]he ways in which lawyers and judges (and even most legal scholars) actually practice and talk about law are not so different than they were a century ago – or even five centuries ago.”³⁵ Those ways are not, of course, univocal. There was a hundred years ago, we have to admit, the phase of Christopher Columbus Langdell, during which legal doctrines (were made to appear) as self-moving marionettes, with the men and women, whose laws they were, hardly to be seen.³⁶ And Langdell was not *sui generis*; Blackstone before him had declared that judges were “living oracles” of a fully wrought law that they merely discovered.³⁷ Today, the Restatement project sometimes seems to treat law as having its own two feet.³⁸

On the whole, however, the Anglo-American legal tradition has tended -- if often unselfconsciously and inarticulately -- toward an understanding according to which, in the famous expression of Lord Coke, “‘Reason is the life of the law; nay, the common law itself [sic] is nothing else but reason.’” “By ‘reason,’ Coke . . . did not mean the natural reason of an individual, but a kind of group or ‘corporate’ reason.”³⁹ Reason, the life of the law, is an “artificial perfection of reason, gotten by long study, observation and experience, . . . fined and refined over centuries by generations of grave and learned men. . . .”⁴⁰

Positive law was never making its own bloody entrance *ex proprio vigore*. Individuals diachronically engaged in practical reasoning were bringing common sense and other learning to bear on problems that called for legal solution. That accretion over centuries was possible because individuals were using their own reason one by one to fine and refine, cumulatively and progressively, what was handed down to them and their contemporaries.

This is a story Mary Ann Glendon has told beautifully, and I shall not repeat it here.⁴¹ The crucial premise is that, although Anglo-American treatise writers and judges have sometimes been reluctant to admit as much, most people engaged in law in the common law tradition have understood themselves to be engaged in an intergenerational chain of practical reasoning. Individuals turning to precedents, statutes, and other sources in order to come to judgment as to the law on a particular point are looking for distilled practical wisdom.

If we were to cast this in terms of Venn diagrams, I would say, with two qualifications to be introduced shortly, that what we have is not “practical reason” supplementing “law,” but “law” as a subset of “practical reason.” Law is that subset of

³⁵ SMITH, LAW’S QUANDARY, *supra* note <>, at 1. [10]

³⁶ See Brennan, *Realizing the Rule of Law in the Human Subject*, *supra* note <>, at 243-49. [21]

³⁷ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *69.

³⁸ Judge Noonan has observed the irony in the American Law Institute’s founders’ emphasis on the character of the project managers. JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW ().

³⁹ See MARY ANN GLENDON, *Knowledge Makes a Noisy Entrance: The Struggle for Self-Appropriation in Law*, in 10 LONERGAN WORKSHOP 119, 129 (Fred Lawrence ed., Boston College 1994).

⁴⁰ The First Part of the Institutes of the Laws of England *97b – I don’t have this source.

⁴¹ See GLENDON, *Knowledge*, *supra* note <>, at 119-44. [39]

practical reasoning that is promulgated to, and potentially given coercive effect for, the common good of the community. The first qualification would be that, obviously, sometimes people engaged in practical reasoning in the name of the law draw on theoretical reason, as when a bureaucrat at the Environmental Protection Agency relies on scientific data in service of drafting a rule regarding treatment of whitefish so as to reduce or eliminate the risk of botulism.⁴² The rule is a piece of practical reasoning for the good of the potential whitefish-eating community, and its quality is in part a function of whether the science behind it is sound.

My reason for rejecting the “law and practical reasoning” strategy, then, is that human/positive law always already was or is a piece of practical reasoning: There’s no “and” about it.

Smith’s principal reason for rejecting this strategy is different. Smith concedes that of course practical reason is at work in law, but suspects that what we do in law cannot adequately be accounted for as an exercise in practical reason. Smith points out ways in which rules of substantive and procedural law with which we in fact work in law are ill-adapted means for solving our actual practical problems. He points to a “practical inefficacy of law’s distinctive discourse.”⁴³ To one scholar’s observation that precedents convey “a wealth of data for decision-making,” Smith replies, in sum, that there are or might be better ways of transmitting apt data for decision-making in law. To Smith’s reply I would reply that the imperfection of our legal methods is not evidence that they are not methods of practical reasoning

There is more to say about this. Another of Smith’s reasons for rejecting the thesis that what we do in law can be adequately explained as practical reason in action is that people use practical reason all the time, as “business executives, arbitrators, school teachers and principals, coaches, parents,” and others, but in no other practical field do we witness “the specific and extraordinary treatment of precedent and text that is so conspicuous in legal discourse.”⁴⁴ Smith is certainly right that law’s methods are unique, but then, law’s purposes are unique. Coaches, parents, business executives, whatever their authority and responsibility within their respective spheres, have neither responsibility for the common good of all nor the coercive power of the state behind them. The common good’s depending, as it does, on *both* stable rules *and* the capacity for disciplined, creative adjustment goes a long way toward justifying the common law method and a common law approach to both statute law and constitutional law. And again, the imperfection of our legal methods hardly subtracts from their being, in fact, methods of practical reasoning.

Smith also mentions Larry Alexander’s point that, on a given issue, it is possible that the Harvard philosophy faculty will have better “moral judgment” than the inherited legal materials offer.⁴⁵ We can leave the remoteness of the possibility to one side,

⁴² See, e.g., *United States v. Nova Scotia Food Products Corp.*, 586 F.2d 240 (2d Cir. 1977).

⁴³ SMITH, *LAW’S QUANDARY*, *supra* note <>, at 92-93. [10]

⁴⁴ See *id.* at 95.

⁴⁵ See *id.*

because there are multiple other reasons for denying that this possibility undermines the claim that our legal practice is an exercise in practical reason. One is that law is not, and no one claims that it is, a given body politic's undifferentiated exercise in practical reason. Law springs from the body politic's successful desire to see a cumulative and progressive growth, rather than an unpredictable or erratic alteration. As Aristotle observed, animate justice would be ideal, but in the real world, prudence requires division of function and creation of office. The historical preference for judge-made law over statute-law reflects in part a fear of erratic alteration of what should be tested by experience and critical reflection thereon. The increasing predominance of statute law reflects, for its part, a desire for law that is made by those who are more democratically accountable (than judges are), certainly not something to which the Harvard philosophy would be caught making claim.

III. "Natural law" as *law*

To what I have been arguing – that what we do in the name of the law is a subset of human practical reasoning – it might be objected that practical reasoning as such cannot generate law. The objection, more fully stated, would be that practical reason can only generate practical reasoning, which, though it may correctly identify worthy ends and well-calibrated means to reach those ends, cannot claim for those results that they are "law." As mentioned above, fathers, mothers, and coaches engage in practical reasoning and then impose their conclusions on their charges, yet it would be eccentric to regard the imposition of these conclusions of practical reasoning as enforcing legislation.

The objection is well taken, to a point. The issue can be illuminated by exploring a lacuna in the legal landscape surveyed by Smith. As we have seen, the quandary in which Smith finds us all is the result, on Smith's view, of our no longer finding the classical premises plausible, at least not officially, while carrying on in law as if they still held. "For many of us," Smith explains, "the classical account is a distant memory; for others it is not even that. So perhaps all we can confidently say is that the classical account, if it were admissible and believable, *might* be of some help."⁴⁶

Smith considers that "[p]erhaps the most systematic working out" of the classical position "had been performed centuries before Blackstone or Story – by Thomas Aquinas."⁴⁷ I agree with this last judgment, but unfortunately Smith never gives the reader of *Law's Quandary* the classical position as developed by Aquinas, and this omission becomes in turn a cause of Smith's, and then potentially our own, disappointment with and distrust of law as a form of "practical reasoning." A more adequate restatement of the classical position, as held by Aquinas, can show what is right about the "practical reason" account of law, including why humans can make *law* (not just reach judgments of practical reason).

⁴⁶ *Id.* at 152.

⁴⁷ *Id.* at 46.

Explicating what he understands to be Aquinas's position, Smith reports that "human or positive law derives from the 'eternal law,' which is the divinely ordained order governing the universe, and positive law gains its status as law by virtue of participating in that order." This is not quite right, or at least materially misleading, but before saying why, we should follow Smith, who quotes Aquinas as follows:

"Since then the eternal law is the plan of government in the Chief Governor," Aquinas explained, "all the plans of government in the inferior governors must be derived from the eternal law.' And it followed that 'every human law has just so much of the nature of law as it is derived from the law of nature.'"⁴⁸

Smith next drops a footnote that glosses the just-quoted language of Aquinas's *Summa Theologiae*: "The 'natural law' or law of nature is that part of the eternal law that is accessible to human reason without the aid of divine revelation."⁴⁹ With this gloss in place, Smith rounds out his summary of Aquinas's position on human law's relationship to higher law by quoting Aquinas' admonition that "if in any point [the human law] deflects from the law of nature, it is no longer a law but a perversion of law."⁵⁰

Next, Smith next anticipates "[a] possible misconception, which leads to a familiar and dismissive caricature, [that] must be guarded against here. The classical position as expounded by thinkers like Aquinas," Smith continues, "did not naively suppose that there is, say, a sort of ghostly Internal Revenue Code in all of its magnificent detail written in the heavens, and that the Code we find in our more terrestrial tax volumes is merely a mundane photocopy of the celestial original."⁵¹ (Smith does have a way with words, not to mention a welcome sense of humor). Because we live after Holmes and his 1917 installation of the "brooding omnipresence in the sky" caricature of the natural law,⁵² this is a needful clarification. Continuing to try to explicate St. Thomas's position, Smith explains:

A few legal rules, such as the prohibition of homicide, might be derived directly from – "read off of," as we say – the eternal law. But the overwhelming bulk of positive law consists of the detailed specification, or *determinatio*, of what the eternal law gives only in generalities. Such specifications are the product of judgments by human legislators, whose pronouncements have the status of law. Even so, the legal status of such pronouncements depends on their indirect derivation from the eternal law, and they should be understood and interpreted in accordance with that overarching reality.⁵³

⁴⁸ *Id.*

⁴⁹ *Id.* at 185 n.12.

⁵⁰ *Id.* at 46.

⁵¹ *Id.* at 47.

⁵² *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

⁵³ SMITH, LAW'S QUANDARY, *supra* note <>, at 47. [10]

In my judgment, the quoted paragraph clarifies but also obscures and mis-describes.

The important clarification that Smith makes here, against the damage done by the misrepresentation entrenched in the collective memory by Holmes’s “brooding omnipresence,” is that, on Aquinas’s understanding, most of the particular decisions or rules implemented by humans as law are humanly-wrought *determinationes*, that is, determinations or specifications of matters left indeterminate or unspecified by “higher” law. There may be some people who once believed, and there certainly are great jurists who said, that the whole body of human law is found, not made. But by now, however, as Mary Ann Glendon says, “[N]o American adult needs to be told that we live under a rule of men in the sense that laws are made, interpreted, and administered by real men and women.”⁵⁴ This is as it should be, but from this it does not follow that those with responsibility for governing the body politic through law are not obligated by (even if, alas, they ignore) a “higher” law.

The lacuna in Smith’s account concerns the natural law. Indeed, in my judgment, *Law’s Quandary* never gives us the natural law as understood by Aquinas And the central tradition following him. A principal reason the reader of *Law’s Quandary* may be led to sympathize with Smith’s quandary is, specifically, the omission of the natural law, the very law that, if “higher,” is also *within* (though not the same as) our very selves.⁵⁵

The omission enters from a number of angles, and Smith has help. In the text of Aquinas glossed by Smith in the footnote quoted above, in which Smith identifies the “natural law” with the “law of nature,” the translator (not Smith) has misleadingly rendered Aquinas’s “*lex naturalis*,” that is, natural law, as “law of nature.” Occasionally, Aquinas does write “*lex naturae*,” law of nature, where one would expect *lex naturalis*. However, natural law is not, on Aquinas’s account, a mere metaphorical periphrasis for “nature” or for the statistical regularities that are observable in nature. On Aquinas’s account, natural law is truly *law*, and this means that when we come to make positive law, there is already *law* at hand to guide us.

This idea, that morality is itself legal or is in the form of law, is almost totally foreign to the modern mind. As Aquinas sees things, however, the providential God has promulgated a *genuine* law in (and for) us, a prospect wholly absent from the cosmology of nature bequeathed by Aristotle to Aquinas. The whole movement of Aquinas’s thought as concerns *lex* is to show the going forth of an ordinance of reason in the divine mind going to human rational animals for their acceptance in freedom. At the risk of getting ahead of ourselves, we can say that the “natural law” is our participation in and continuance of the divine governance itself, nothing less and nothing more – not a myth, not a vague invocation of transcendence.

⁵⁴ MARY ANN GLENDON, *A NATION UNDER LAWYERS* 10 (Harvard University Press 1994).

⁵⁵ William Wagner remarks on Smith’s “curious silence” about “St. Thomas’s jurisprudence fit[ting] within the sub-variety Smith terms ‘Law and (or as) practical reason.’” Wagner, *Echo of the Infinite*, *supra* note <, at 675. [13] See also Patrick McKinley Brennan, *Law, Natural Law, and Human Intelligence: Living the Correlation*, 55 CATH. U. L. REV. 731, 756 (2006). Smith’s silence becomes less curious as one grasps the lack, in the classical landscape as Smith reconstructs it, of a natural law that is accessible as practical reason’s measure.

What Aquinas means by “law” is both clear and steady. He defines law as “an ordinance of reason for the common good, made by him who has care of the community, for the common good.”⁵⁶ Mind is the only true location of law. Law is *primarily* in the mind of the lawgiver/legislator and *secondarily* in the mind of the one who is ruled. Strictly speaking, law is *always and only* in reason or in the mind, *in intellectu*. As Russell Hittinger explains, “In a very extended sense of the term (*per similitudine[m]*) law is ‘in’ things devoid of reason: the law books, the red light, the physical flow of traffic itself.”⁵⁷ Strictly speaking, the only place law is “in” is the intellect. “Substantial” this is not, though without threat to its reality.

What *exactly*, then, is the “natural law” – which, I contend, Smith never gives us?

[L]aw, being a rule and measure, can be in a person in two ways: in one way, as in him that rules and measures; in another way, as in that which is ruled and measured, in so far as it partakes of the rule or measure. Wherefore, since all things subject to divine providence are ruled and measured by the eternal law[,] it is evident that all things participate somewhat of the eternal law, in so far as, namely, from its being imprinted on them, they derive their respective inclinations to their proper acts and ends. Now among all others, the rational creature is subject to Divine providence in the most excellent way, in so far as it partakes of a share of providence, by being provident both for itself and for others. Wherefore it has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end: and this participation of the eternal law in the rational creature is called the natural law. . . . [T]he light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing else than an imprint on us of the Divine light. It is therefore evident that the natural law is nothing else than the rational creature’s participation of the eternal law.⁵⁸

The natural law is the rational creature’s participation in the eternal law, which in turn is the “very Idea of government of things in God the ruler of the universe.”⁵⁹ The natural law is not a law diverse from the eternal law; it is a participation thereof. As such, it is not law in a diminished or qualified or metaphorical sense. The natural law enjoys the nature of law “*maxime*.”⁶⁰

⁵⁶ 1 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* I-II, 90.4 c. (Fathers of the English Dominican Province trans., Benziger Brothers, Inc. 1947).

⁵⁷ RUSSELL HITTINGER, *THE FIRST GRACE* 96 (2003).

⁵⁸ AQUINAS, *SUMMA THEOLOGICA*, *supra* note <>, at 91.2 c. [56]

⁵⁹ *Id.* at 91.1 c.

⁶⁰ “Lex . . . naturalis maxime habet rationem legis.” SANCTI THOMAE DE AQUINO, *SUMMA THEOLOGIAE* I-II 90.4 obj. 1 (Edizioni San Paolo 1988). This assertion occurs in one of the objections, so it cannot without more be taken to state Thomas’s own view. The reply to the objection neither denies nor qualifies the assertion, and this in the context of the very article in which Thomas first advances his complete

Aquinas never says that law is “in” nature, not even in individual occurrences of human nature.⁶¹ What makes the natural law “natural” is not its origin (which is divine), but the mode of its promulgation and reception.⁶² On Thomas’s view, law is an extrinsic principle of human nature:

[L]aw properly exists in a mind. Law is an extrinsic principle because it is not a predicate of human nature. Man is a rational animal, but he is not a law. Therefore, the use of the word nature (*natura, naturalis, naturale, naturaliter*) in connection with law is meant to highlight how the intrinsic principles of human nature receive or hold the legal measure.⁶³

We need not delay here over the particulars of the mode of the promulgation and reception, as the crucial point, for filling up the gap in Smith’s account of the classical position held by Aquinas, is that every rational person is possessed of a genuine law according to which he can and is obligated to make practical judgments.

Using his practical reason, the person does not simply reason about nature or something else; he does, or he should, conform to the natural law that is his participation in the divine providence (and, to the extent the natural law is under-determinative, go on to give it *determinatio*). As Jacques Maritain explains,

What emerges from [Thomas’s doctrine] . . . is that the Natural Law is known by human reason, but that human reason, in its rational exercise, has no part in its establishment. The divine reason alone is the author of the Natural Law. It alone causes that Law to exist, and it alone causes it to be known, insofar as it is the cause of human nature. Let us say . . . that here the divine reason is *the only reason* to be considered. The law, in effect, is essentially an ordinance of reason (*ordinatio rationis*), so that without an ordering reason there is no law. The notion of law is essentially bound up with that of an ordering reason. . . . The fact that the divine reason is the only reason which is the author of the Law enables us to understand better the meaning of St. Thomas’ expression: Natural Law is a participation of the Eternal Law. It is the divine reason which is involved. If human reason had a hand in it, the Law would to that extent, have no more than the value of human authority.⁶⁴

Smith raised – and rejected -- the possibility that law as we practice it needs to be supplemented with something other than law. The second qualification I would add to my thesis that law is a subset of practical reason is this: practical reason can proceed to

definition of law. See Steven Louis Brock, *The Legal Character of Natural Law According to St. Thomas Aquinas* (1988) (Ph.D. dissertation, University of Toronto).

⁶¹ Hittinger, *supra* note <>, at 97. [57]

⁶² *Id.*

⁶³ FG, 301, 17

⁶⁴ Jacques Maritain, “Natural Law and Moral Law,” in RUTH ANSHEN, *MORAL PRINCIPLES OF ACTION* 62, 66-67 (1952).

make law by judging in conformity with the natural law. Or, to reverse the point, law – the natural law – needs to be known and given effect by practical reason. As I observed above, law was never entering *ex proprio vigore*; it always depends, for its entrance into human living, on the exercise of practical reason and the antecedent free choice of the will.

To Smith’s assertion, quoted above, that “human or positive law derives from the ‘eternal law,’” one can reply by quoting Aquinas: “[I]n temporal law there is nothing just and lawful, but what man has drawn from eternal law.”⁶⁵ On Aquinas’s account, however, man does as much principally⁶⁶ by reaching practical judgments in conformity with the natural law, which is “higher” law in the sense that the pedigree of the legislation is divine, but which is received and held right here *in terra firma*, and more specifically, *in hominis intellectu*. When legislators pass true laws, they do as much, on Aquinas’s account, through using their practical reason to reach judgments that implement (by being in conformity with) the natural law.⁶⁷ To Smith’s assertion that “positive law consists of the detailed specification . . . of what the eternal law gives only in generalities,” I would reply that positive law consists of the detailed specification of what the *natural law* gives only in generalities; the eternal law itself contains every last detail of creation (both God’s antecedent will for his rational creatures and, in view of their free choices, his consequent will).⁶⁸

The second qualification to be added to my above-claim that law is a subset of practical reasoning is, then, that what we do in law is practical reasoning about the natural law (and, to the extent it is under-determinative, about what is necessary or desirable to give it *determinatio*). The natural law is the object of practical reason, not a mere complement to a hitherto-incomplete act. Whatever the adequacy or inadequacy of prevailing ontologies, there is no ontic gap: God has legislated in His creatures, and they are equipped with practical reason by which to know that law and give it effect in their living, including through the creation and enforcement of positive law. That law, though hardly substantial, is in the human intellect, having first be in the divine mind.

IV. Implementing the Natural Law

This was the view of lawmaking that predominated in Catholic social doctrine until shortly ago, and it had radiating consequences that may not jump to mind. Some of these are important for understanding the currently available Catholic positions vis-à-vis *Law’s Quandary*.

⁶⁵ AQUINAS, *SUMMA THEOLOGICA*, *supra* note <>, at I-II 93.3 c. [56]

⁶⁶ “Principally,” but not exclusively, because he also does so with reference to divine positive law.

⁶⁷ []

⁶⁸ Every particular is contained in the eternal law. See Aquinas, *Summa theologiae*, ___

First, there is an implication that is nothing short of “radical.”⁶⁹ Every rational creature is in fundamentally the same position vis-à-vis the natural law, and that position is, as one might say, empowering. “Every created intelligence,” as Hittinger observes of St. Thomas’s account,

not only has a competence to make judgments, but to make judgments according to a real law – indeed, a law that is the form and pattern of all other laws. Thus, the legal order or things does not begin with an acquired virtue, possessed by a few; nor does it begin with the offices and statutes of human positive law; nor does it begin with the law revealed at Sinai. God speaks the law, at least in its rudiments, to every intelligent creature.⁷⁰

Every rational person’s being equally in position to reach a judgment according to a true law entails, at one level, a radical equalitarianism. Every rational person is, in virtue of his or her opportunity and obligation to act according to her or his participated share in the eternal law, engaged in the divine governance. Justice Scalia is of the view that “God applies the natural law.”⁷¹ Thomas Aquinas understands that God entrusts that work to all of us.

From this it does not follow, however, that the function or office of making and enforcing law falls to everyone equally. The body politic must create functions or offices, and those who possess them are limited *both* by the metes and bounds of their respective offices *and* by the natural law. Legislators, judges, and executives have their specific roles to fulfill, and exactly what those are turns on the particulars of the particular polity. What does not turn on the particulars of the particular polity is that usurpation of authority that has not been assigned is always “an offense against the common good.”⁷² Everyone has the capacity to reach judgments according to the natural law, but only some have the power to make, adjudicate, or enforce law for the body politic. Everyone, in virtue of his or her natural law sharing in the eternal law, is a participant in the divine rule. Those possessed of office are participants in the divine rule in a special way.

According to Pope Leo XIII (r. 1878-1903), who gave modern Catholic social doctrine its classic formulation, “in civil society, God has always willed that there should be a ruling authority, and that they who are invested with it should reflect the divine power and providence in some measure over the human race.”⁷³ “Authority,” Leo explains,

⁶⁹ Hittinger, 98.

⁷⁰ Id.

⁷¹ Antonin Scalia, Assoc. Justice, U.S. Supreme Court, *The Common Christian Good*, Speech at the Gregorianum University Symposium on Left, Right, and the Common Good (May 2, 1996) (transcript available at <http://www.learnedhand.com/scalia.htm>).

⁷² HITTINGER, *supra* note <>, at 103.

⁷³ *Immortale Dei*, no. 4.

is the one and only foundation of law – the power, that is, of fixing duties and defining rights, [and so forth]. But all this, clearly, cannot be found in man, if, as his own supreme legislator, he is to be the [supreme] rule of his own actions. It follows, therefore, that the law of nature is the same thing as the eternal law, implanted on rational creatures, and inclining them to their right action and end; and can be nothing else but the eternal reason of God, the Creator and Ruler of the world.⁷⁴

On Leo’s understanding, all ruling power – all authority – is *ad imaginem Dei*. Humans receive a share in the divine rule, and it falls to them freely to mirror it and give it effect in temporal affairs. All human government is under divine law, and, as such, it enjoys a majesty and dignity that exceed merely human artifice.⁷⁵ “No man,” Leo explained, “has in himself or of himself the power of constraining the free will of others by fetters of authority This power resides solely (*unice*) in God, the Creator and Legislator of all things; and it is necessary that those who exercise it should do so as having received it from God.”⁷⁶

V. Benedict and the Whither of the Natural Law?

Gradually but demonstrably, over the course of the last century-plus, Catholics, both popes and others, took leave of various parts of the Leonine synthesis that was, in its essentials and particulars, an updating and application of the political theology of Aquinas. I have chronicled some of the major components of that decomposition in *The Decreasing Ontological Density of the State in Catholic Social Doctrine*.⁷⁷ For present purposes, we can fast forward to the current state of the story, where it becomes clear that Pope Benedict draws surprisingly close to Smith’s diagnosis of a quandary in law. *Relatedly*, Benedict, like Smith – though for different reasons – does not quite give us the natural law as understood by Thomas and as developed and applied in Catholic social doctrine of the twentieth century, from Leo XIII through Pope John Paul II (r. 1978-2004). In evidence of this claim I draw on the writings of Benedict XVI and of Joseph Cardinal Ratzinger.

In the first major teaching document of his pontificate, the encyclical letter *Deus caritas est* (God is love) published in 2005, Pope Benedict invited Christians to reflect on the ways in which God’s love for man calls for individual persons to share that love with others, especially the needy. In making way for love, so to speak, Benedict had occasion to clarify the scope and purposes of the state and of politics. In identifying what is not the Church’s direct work, Benedict explained that “the formation of just structures . . .

⁷⁴ Libertas no. 8

⁷⁵ This does not mean that human government is “sovereign,” at least as this English word is ordinarily understood. See Patrick McKinley Brennan, Sovereign States? The State of the Question from a Catholic Perspective,” in ROBERT COCHRAN (ed.) FAITH AND LAW (forthcoming NYU Press 2007).

⁷⁶ Leo XIII, encyclical Diuturnum 5-7.

⁷⁷ Patrick McKinley Brennan, *The Decreasing Ontological Density of the State in Catholic Social Doctrine*, ___ VILL. L. REV. ___ (forthcoming DATE?) (Scarpa symposium).

belongs to the world of politics, the sphere of the autonomous use of reason (*rationis sui ipsius consciae*).”⁷⁸ This would have been an obvious and opportune place to mention the law in accordance with which practical reason is to reach the judgments as to what structures are just. There is no suggestion in the encyclical that the state and its officers are sharers in the divine rule through their natural law participation in the eternal law. In derogation from this view, the work of politics is described as a work of practical reason:

Justice is both the aim and intrinsic criterion of all politics. Politics is more than a mere mechanism for defining the rules of public life: its origin and its goal are found in justice, which by its very nature has to do with ethics. The State must inevitably face the question of how justice can be achieved here and now. But this presupposes an even more radical question: what is justice? The problem is one of practical reason⁷⁹

Is it not also one of natural law?

Papal encyclicals are not philosophical treatises; they “possess a summary quality . . . due to their didactic purpose.”⁸⁰ The result is that “[t]he scholarly commentator is therefore obliged to build upon the texts to bring forth from them a coherent, fuller treatment of the matters addressed therein.”⁸¹ Especially given that the primary topic of the encyclical was not the state, law, or society – but rather the demands of Christian charity – the silence may be a false signal.

The term “natural law” is not wholly absent from the text of *Deus caritas*, after all. By my count, it occurs exactly once, as Pope Benedict explains the basis of the Church’s teaching regarding what it is in the responsibility of laity (not of the Church as such, or of her clergy) to pursue in politics and law. “The Church’s social teaching,” Benedict explains, “argues on the basis of reason and natural law, namely, on the basis of what is in accord with the nature of every human being” (*a ratione et a naturali iure, id est ab eo quod congruit cuiusque personae humanae*).” On the traditional understanding, the content of the natural law is indeed “what is accord with the nature of every human person;” it was also, however, a law. Is this Benedict’s view? The Latin phraseology of the encyclical enshrouds this issue, and the German (original) from which the Latin was prepared is of no help: “*von der Vernunft und und vom Naturrecht her, das heist von dem aus, was allen Menschen wesensgemass ist.*”⁸²

What the encyclical leaves obscure seems clear in certain pre-pontificate texts of Cardinal Ratzinger. In a 1986 book that treats at length of political topics, Cardinal Ratzinger wrote that “Catholic theology has since the later Middle Ages, with the acceptance of Aristotle and his idea of natural law” The rest of the sentence does

⁷⁸ Pope Benedict XVI *Deus caritas est* no. 28 (2005).

⁷⁹ *Deus caritas* 28a

⁸⁰ 1 ROBERT P. GEORGE & GERARD V. BRADLEY, *Pope John Paul II, in THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE* 220, 225 (John Witte Jr. & Frank S. Alexander eds., Columbia University Press 2006).

⁸¹ *Id.*

⁸² Add umlaut

not matter for the present purpose. Though Aristotle did, and exemplarily, have a concept of nature, Aristotle did not have a concept of natural *law*. Lacking a concept of a personal, ruling God, Aristotle had appeal to no norm higher than the conditions of the possibility of humans reaching their natural potency for flourishing. Human law in Aristotle's cosmos is in no way a function or product of a participation in a higher law.

In a talk given at the Catholic Academy of Bavaria in January 2004, under the title, "What Keeps the World Together: The Prepolitical Foundations of a Free State," Ratzinger set as his task to identify "genuinely evidential character – values sufficiently strong to provide motivation and sufficiently capable of being implemented. . ."⁸³ He then offered a brief (and, by his own admission, incomplete) history of natural law theorizing, mentioning Gratian, Ulpian, Vitoria, Pufendorf, Grotius, and others, but not Aquinas, and never the eternal law, and certainly not a doctrine of participation. (Recall that for Aquinas, natural law is not diverse from the eternal law). Here is Cardinal Ratzinger's statement, on that occasion, about the status of the natural law today:

Natural law has remained – especially in the Catholic Church – one element in the arsenal of arguments in conversations with secular society and with other communities of faith, appealing to shared reason in the attempt to discern the basis of a consensus about ethical principles of law in a pluralistic, secular society. Unfortunately, this instrument has become blunt, and that is why I do not wish to employ it to support my arguments in this discussion. The idea of the natural law presupposed a concept of "nature" in which nature and reason interlock: nature itself is rational. The victory of the theory of evolution has meant the end of this view of nature. . . . [The] last surviving element [of the doctrine of natural law] is *human rights*. . . . Perhaps the doctrine of human rights ought today to be complemented by a doctrine of human obligations and human limits.⁸⁴

The traditional doctrine of natural law requires that being be intelligible by theoretical and practical reason; it also requires, however, that God have legislated in his rational creatures.

Benedict's practical concern is clear: The state that wrongly claims divine warrant is an enemy to be feared. The Leonine state was to reflect to the world, as best it could, an image of the divine rule. Today, according to Benedict, "Christian faith has dethroned the idea of a political theocracy. In modern terms," the Pope continues, "it has brought about the secularity of the state."⁸⁵ One way in which a state can be secular is for it not to prioritize or privilege any one religion or group of religions. Another way for a state to be, or try to be, secular is not to trace its authority to God, not to understand

⁸³ RATZINGER, VALUES, *supra* note <>, at 37. [2]

⁸⁴ *Id.* at 38-40.

⁸⁵ Ratzinger, *supra* note <>, at 114. [Values]

itself as making law as an extension of and participation in the divine governance. As envisaged by Benedict, the modern state is to do both.

One of the leading notes of Benedict's young pontificate is a clarion call to all people to use reason, rather violence, to solve problems and create a just social order. The invitation to men and women of all faiths to plumb the depths of human reason and explore anew its capacities is welcome and urgently needed. As theologian Frederick Lawrence explained some years ago,

[T]he Church's current activity in the intellectual sphere is not making sufficiently manifest how the basic thrust of Catholic Christianity is in harmony with full-fledged intellectualism, let alone that intellectual life is integral to the Church's mission. The Church today needs to proclaim loud and clear that understanding the natural order of the cosmos in the human and subhuman sciences, and in philosophy and theology, is part of appreciating God's cosmic Word expressed in creation. It is part and parcel of the fullness of the Catholic mind and heart.⁸⁶

Benedict's proclamation is loud and clear. Its echoes, however, bring us into only the vestibule of a truly legal edifice. Unless it receive a law, on what basis can human reason proceed to make law? Has Benedict created – or, alternatively, acknowledged – a quandary in law?

VI. Creation without law?

In the *Gallic War*, Julius Caesar reported that among the Germans, theft was no longer considered wrong. This German lapse later served St. Thomas Aquinas as an example of how a whole culture can lose knowledge of secondary precepts of the natural law. Today the Pope is a German, and he seeks to remind the world of realities that it frequently overlooks or denies, including the potency of reason. Today Smith suggests to students of Anglo-American law that “we would perhaps be wise to confess our confusion and to acknowledge that there are richer realities and greater powers in the universe than our meager modern philosophies have dreamed of.”⁸⁷ What are these realities and powers, we might ask, and do they imbue in us a law by which to live? Neither the Pope nor Smith considers recourse to the natural law, as traditionally understood, availing.

It can hardly be denied that argument from “natural law” has become blunt, at least in the quarters where it might be most needed; people do not understand, and not understanding they cannot agree (or disagree). Sympathetic though it sets out to be, Smith's summary of the classical position manages pretty much to eclipse the God-given basis for creating positive law. People trying to make law solely on the basis of practical reasoning about nature may indeed get the content right (they may reach a correct judgment of practical reason), but, as Russell Hittinger has observed ominously: “Once

⁸⁶ Quoted in Mary Ann Glendon, *Traditions in Turmoil* 430 (2006).

⁸⁷ SMITH, *LAW'S QUANDARY*, *supra* note <>, at 179. [10]

the natural law is equated with the human power to make practical judgments, its specifically legal character as a received (or participated) law is muted, if not abandoned.”⁸⁸

So what? When the “natural law” is understood not to be “a received (or participated) law,” there are two obvious consequences. First, the human person understands himself or herself no longer to be under *law* (except perhaps divine positive law, such as the Ten Commandments). On what basis, then, can he or she make law? Reasonableness, accommodation, interests, and so forth are what they are, but are they a basis for a person’s or a community’s making law? Can the lawless proceed to make law? The appearance is one of lawlessness.

Second, those who do not enjoy a participated share in the eternal law do not, therefore, enjoy a participated regality. On the traditional view, the human’s share in the divine rule assured a majesty, a *gravitas* to law and politics, qualities not associated with “a reasonable accommodation of the diverse needs and interests of people living together in community.” Among the achievements of which the latter is structurally incapable is aiding man in his “ascent to heaven.”

More dramatic, *in the short run*, is a third failure. People who regard themselves as not under a received law may unwittingly violate that law. For present purposes, we can stipulate that it will be for God to settle the post-mortem consequences of involuntary violation of the natural law. However, no matter how forgiving God may (or may not) be, we can say with certainty that nature is strict – or, as the Model Penal Code prefers “absolute” -- liability. The terrestrial consequences of violation of the natural law are palpable. As Charles Taylor observed in the language quoted at the outset, we have not yet seen and felt the collective consequences of living an exclusive humanism. What we have seen and are feeling, however, is that an exclusive humanism leads to a degraded view of the human. As Pope Benedict has observed, “the attempt, carried to extremes, to shape human affairs to the total exclusion of God leads us more and more to the brink of the abyss, toward the utter annihilation of man.”⁸⁹ Short of “utter annihilation” are the little annihilations – the hungers, the starvations, the injustices of other sorts, as well as the apathy, the self-loathing, and pointlessness of, say, Europe’s negative birth rate.

Benedict’s response, which is in the nature of a “wager,”⁹⁰ is this:

In the age of the Enlightenment, the attempt was made to understand and define the essential norms of morality by saying that these would be valid *etsi Deus non daretur*, even if God did not exist. In the situation of confessional antagonism and in the crisis that threatened the image of God, they tried to keep the essential moral values outside the controversies and to identify an evidential quality in these values that would make them

⁸⁸ Hittinger, *supra* note <>, at 46.

⁸⁹ JOSEPH CARDINAL RATZINGER, *CHRISTIANITY AND THE CRISIS OF CULTURES* 51 (Brian McNeil trans., Ignatius Press 2006).

⁹⁰ *Id.* at 22.

independent of the many divisions and uncertainties of the various philosophies and religious confessions. . . .

We must [today] reverse the axiom of the Enlightenment and say: Even the one who does not succeed in finding the path to accepting the existence of God ought nevertheless to try to live and to direct his life *veluti si Deus daretur*, as if God did indeed exist. This is the advice Pascal gave to his non-believing friends, and it is the advice that I should like to give to our friends today who do not believe.⁹¹

Is this consistent with the de-mythologization project? And, in any event, from God's (as if) existence, what follows? A God who does not legislate for his rational creatures? St. Thomas thought that rational human creatures could by simple inference conclude that God was the author of their ability to discern right from wrong; only a "blameworthy stupidity"⁹² could prevent human agents from knowing that moral norms are binding in virtue of something higher than our human minds.

American legislatures continue to legislate, judges continue to judge under just positive law, and executives continue to execute just positive laws. These facts demonstrate that, whatever our theories, our practice seems to hold up, at least in the main. Individual agents and groups can reach correct judgments about the content of the natural law without understanding that they are doing as much, and go on to give those judgments coercive effect. (Which is not to say that mistakes are not being made). As the higher law framework recedes from consciousness, however, and human agents understand themselves to be producing laws without having first received law, the enterprise cannot but seem arbitrary, at least from the point of view of those against whom the laws are being enforced. Smith was indeed on to something. Moreover, although an ontological quandary does not entail an ontic quandary, an ontological quandary does increase the probability of ontic harm – people proceeding in disregard of what is ontically possible and exigent. A world that waits for God to apply the natural law is in for chaos.

There is no use repeating formulae that no longer appeal, as Pope Benedict appreciates. Neither re-mystification nor false confession of confusion is availing. Nor is there use not pursuing the consequences and possibilities of a true philosophy. Those informed by the natural law tradition will press on, one judgment at a time, confident that today's emaciated ontologies do not deliver us to an ontically deficient world. The program to be followed in law mirrors the one sketched by Bernard Lonergan, in another context:

There is bound to be formed a solid right that is determined to live in a world that no longer exists. There is bound to be formed a scattered left, captivated by now this, now that new possibility. But what will count is a perhaps not numerous center; big enough to be at home in both the old and

⁹¹ *Id.* at 50-52.

⁹² FG 54 – I don't have this source.

new; and painstaking enough to out one at a time the transitions to be made.⁹³

The common law method, informed by the natural law and driven by practical reason, was such a center. Smith was right to capitalize on the implications of its survival. Those implications, though, are at cross-purposes with Smith's cagey hope for a sort "transcendental positivism."

⁹³ Bernard Lonergan, "Dimensions of Meaning," in 4 Collected Works of Bernard Lonergan ___.