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"What's the Matter with You Catholics?" Soundings in Catholic Social Thought: Traditions in Turmoil. By Mary Ann Glendon

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Patrick McKinley Brennan

Abstract

This review essay of Mary Ann Glendon’s Traditions in Turmoil (2006) explores such topics as tradition, moral discourse, human rights, subsidiarity, natural law, the common good, civil society, and constitutional and statutory interpretation. In doing so, it provides an introduction both to Catholic social thought and to the thought of Bernard Lonergan.

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Book Review Essay

"What's the Matter with You Catholics?" Soundings in Catholic Social Thought:

Traditions in Turmoil. By Mary Ann Glendon.[*]

Reviewed by PATRICK MCKINLEY BRENNAN[+]

I. *A Traditionalist of a Certain Kind*

What might otherwise be the impertinence of the question in my title is annulled by the fact that it was asked of Mary Ann Glendon by her husband, Edward Lev. The provocation that led to his inquiry, as Glendon lays it out in *Traditions in Turmoil*, was her reporting to Lev that someone had just taken down all the crucifixes in the law school where she taught. At the time she was at Boston College Law School, "a Jesuit and Catholic" institution. "What's the matter with you Catholics? There would have been an uproar if anyone did anything like that with Jewish symbols. Why do Catholics put up with that sort of thing?"

"That was a turning point for me," Glendon reveals. "I began to wonder: Why do we Catholics put up with that sort of thing? Why did we get so careless about the faith for which our ancestors made so many sacrifices?"[1]

Glendon, for her part, is not careless about the faith; nor, on the other hand, is she doctrinaire about it, or about anything else, for that matter, that comes in for her consideration in *Traditions in Turmoil*. The book is a wide-ranging study of a varied host of leading legal, social, cultural, and religious questions of our day. Whether the question is the role of the judge in our constitutional democracy, the leadership of women in the Catholic Church, the place of neighborhoods in the development of the virtues necessary to democratic self-government, or universal declarations of human rights, Mary Ann Glendon's thought in *Traditions*, as elsewhere, exudes a docile confidence and a confident docility that human intelligence can bring forth from our traditions worthy solutions to today's problems. The book's forty-eight chapters, all originally occasional pieces, are arranged under five headings: I. Law and the Human Sciences, II. The Ecology of Freedom, III. Law and Culture, IV. Human Rights, and V. Catholicism in a Time of Turmoil. Throughout, the volume reveals a cheerful

[*] MARY ANN GLENDON, TRADITIONS IN TURMOIL (2006).

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[1] MARY ANN GLENDON, TRADITIONS IN TURMOIL 425 (2006).

warrior at work, a generous intellect engaged with the problems of our day and ever eager to move the conversation forward by coming out to meet people where they are. And who doesn't need to be met where he or she is?

I do not intend this question to be rhetorical, but rather an entrée to one of the distinctive and—with a qualification to be added later—most admirable qualities of Glendon's work in *Traditions*. Glendon's style is conversational rather than argumentative or assertoric—and that it is, is no accident.[2] Glendon, the public intellectual, is well-schooled in rhetoric and the methods of persuasion; but she is well-schooled as well, in how human *intellectus* or intelligence works, or fails to work. Glendon is, moreover, a master of the connection between the methods of human *intellectus* and the methods of human communication. She cares enough to wish to change people's minds, and she knows that this may require changing their hearts. She knows how to use irony and humor. She never preaches, and her work exudes an awareness that no one is converted by a syllogism.

Not everyone grasps as much.[3] A whole lot of today's public philosophy falsifies the processes of human learning and responsible living. For example, though John Rawls, having died, may have moved on to higher things, the dominant mode of political philosophy today remains the one according to which, as Alasdair MacIntyre describes it, "[r]ational justification [is] to appeal to principles undeniable by any rational person and therefore independent of all those social and cultural peculiarities which the Enlightenment thinkers took to be the mere accidental clothing of reason in particular times and places."[4] Glendon knows better—and counters that human knowing, natural and all rational justification, are tradition-dependent. She knows, that is, that *intellectus* advances, if at all, through a working tradition. The book's title is well chosen, in both its parts.

By tradition Glendon means "an extended process of collaboration"[5]—in Alasdair MacIntyre's expression that Glendon quotes approvingly, a "historically extended, and socially embodied" process which sets the conditions for its own continuous growth and development.[6] To be a traditionalist *in that sense*, Glendon explains, "is neither to be backward-looking, nor bound to a status quo, but rather to be a participant in a community of intense discourse about whatever it is that gives the tradition in question its point and purpose."[7] To be a traditionalist *in that sense* is to be meeting the conditions of the possibility by which "knowledge makes [a] slow, if

[2] On conversing with texts (as opposed to authors), see DAVID TRACY, PLURALITY AND AMBIGUITY 19 (1987).

[3] "The key to a harmonious society does not lie—as Glendon suggests—in forcing nice people to reason together until their disputes may boil over." Richard Epstein, *Book Review: Rights and "Rights Talk"*, 105 HARV. L. REV. 1106, 1114 (1992).

[4] ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 6 (1988).

[5] GLENDON, *supra* note 1, at 5.

[6] Mary Ann Glendon, *Knowledge Makes a Noisy Entrance: The Struggle for Self-Appropriation in Law*, 10 LONERGAN WORKSHOP 119, 123 (1998) (quoting Alasdair MacIntyre, After Virtue 207 (1981)).

[7] *Id.*

not a bloody, entrance."[8] As Glendon understands it, tradition is the crucible that alone allows people to engage in the discourse that can lead to knowledge. No tradition, no discourse; no discourse, no knowing.

But not every discourse, not even every intense discourse leads to knowledge. What then makes the difference? Glendon's answer: The satisfaction of "the unrestricted desire to know"—"one of the most powerful drives known to the human species,"[9] and the one that manifests itself in the questions that just keep occurring as long as we are not asleep or comatose, and as long, of course, as questions are not stifled.

We can stifle our own questions, to be sure, and others—indeed a whole culture—can do it for us. Indeed, one possible assessment of garden variety political liberalism is that it is a campaign to interdict our individual and collective questioning in order to install, once and for all, the principles of political liberalism.[10] When questions are stifled, however, and traditions are arrested, turmoil is the result. Stifled questions breed frustration and stagnation, and such foul fruits are not only an extrinsic condition, garbage festering tidily inside plastic bags that we put outside, they are also internal. This is because the process of asking and answering questions—that is, the process of becoming a knower—is constitutive of who we are, as is, *pari passu*, the process of not asking or answering questions, and of becoming a know-nothing.

In sum: When the sometime participants in a living tradition can no longer grow in the ways the tradition once allowed, they internalize the loss. Without benefit of a living tradition, knowledge cannot either enter the mind or guide action. When traditions are moribund or otherwise dysfunctional, learning grinds or slams to a halt, and if living goes on, at least for a while, necessarily it does so without benefit of knowledge of the world as it actually now is or could become.

Glendon is a problem-solver, as all lawyers should be. As far as *our* lived traditions and their promise go, Glendon is concerned yet hopeful. "During the waning years of the twentieth century," Glendon observes, "the traditions discussed in these essays—legal, social, and religious were in a state akin to that which students of complex adaptive systems call 'the edge of chaos.'" She continues:

> The edge of chaos is a scary place, but it is also charged with potency. A time of turmoil is a time of testing and responsibility if one believes, as I do, that the course of human events can be influenced to some extent by human intelligence, cooperation, determination, and good will.[11]

[8] BERNARD LONERGAN, INSIGHT: A STUDY OF HUMAN UNDERSTANDING 186 (1958) (quoted by Mary Ann Glendon in *Knowledge Makes a Noisy Entrance*, Glendon, *supra* note 6, at 119).

[9] GLENDON, *supra* note 1, at 17.

[10] *See* MICHAEL J. WHITE, PARTISAN OR NEUTRAL? THE FUTILITY OF PUBLIC POLITICAL THEORY (1997); Patrick M. Brennan, *Political Liberalism's Tertium Quiddity: Neutral "Public Reason"*, 43 AM. J. JURIS. 239 (1998) (reviewing White's Partisan or Neutral).

[11] GLENDON, *supra* note 1, at xii.

Glendon comes out to meet her readers where they are, and indicates, gently but with precision, where we ought, and ought not, to go next, one step at a time. Where we are is, in her vision, situated, within multiple traditions, some better equipped than others to give response to our questions; where we ought to go next, in particular, is where the adding of a layer of intelligence to our received traditions would indicate. These two notions, tradition and intelligence, are what drive Glendon's analysis, whatever the topic.

Still, what in the world does it mean to satisfy the "unrestricted desire to know?"

II. *The Tradition of Catholic Social Doctrine*

Most of the essays that became the chapters of *Traditions* "were written from the vantage point of the law, which," as Glendon observes, "Oliver Wendell Holmes, Jr., once likened to a magic mirror in which one could see all the triumphs and tragedies, struggles and routines of the human race."[12] Glendon's understanding of how Anglo-American law has served, until recently, as "almost a textbook example of what Alasdair MacIntyre has called a living tradition, one that is 'historically extended' and 'socially embodied,' whose development constantly points beyond itself,"[13] is important in its own right, and there will be something to say about it in Section VI. None of us, however, lives in only one tradition, and some of the traditions we bear within ourselves are more vital to our maintenance and development than others are. As we move along and move back and forth among family, in-laws, work, school, clubs, and church, we move among the multiple manifestations and locations of varied traditions, some more important to us than others but all of them somehow constitutive of who we are.

In the inspiring narrative of Chapter 44, "Why I'm Still a Catholic" (the chapter in which she relates the vignette about the removal of the crucifixes), Glendon reports that she is "not only 'still' a Catholic, but an enthusiastic Catholic."[14] Why? There is the grace of God of course, mediated through the sacramental life of the Church, as well as the influence of a rich intellectual tradition that includes figures such as Evelyn Waugh and T.S. Eliot—and to these Glendon attaches due and proportionate importance. But there is something else that has also mattered immensely:

> Like many Catholics of my generation . . . , I entered the 1960s with a livelier appreciation of the spiritual and intellectual riches of my religion than of its social mission. The Second Vatican Council [1962-65] and encyclicals *Mater et Magistra* [1961] and *Pacem in Terris* [1963] thus came as a revelation and inspiration.[15]

[12] *Id.* at xi.
[13] *Id.* at 4.
[14] *Id.* at 403.
[15] *Id.* at 402.

Glendon continues: "In the three decades that have passed since the Second Vatican Council, Catholic social teaching has come into its own, attracting increased interest and study from non-Catholics and Catholics alike."[16] By her own confession, it is "[t]hanks to the flowering of Catholic social thought" that Mary Ann Glendon is that "enthusiastic" Catholic.[17]

Upon founding the Pontifical Academy of the Social Sciences in 1994, Pope John Paul II invited Mary Ann Glendon, then, as now, a chaired professor in the Harvard Law School, to serve as one of its members, and eventually she became its President, a position she holds today (while also serving as the United States Ambassador to the Holy See). One can speculate as to the faculty-hallway talk at Harvard Law School when news broke that one of its own was entering upon official service to the Holy Catholic Church and its Pope in Rome. Still, there is a fair question to be asked: What have Cambridge, Massachusetts, and Pound Hall to do with Vatican City and Casina Pio IV? After all, Glendon is not by training or practice a canon lawyer.

The answer, or at least one true answer, is that both have the services of this lawyer—trained, to be sure, both in the Anglo-American and the civil law traditions—whose toolbox for solving social problems happens also includes the intellectual tool that is Catholic social thought. Not only is Glendon an *admirer* of Catholic social thought; she is a *practitioner* of the same. One of the traditions in which Glendon is most embedded, learned, and *engaged* is that sub-strand of the Catholic tradition that is known today as Catholic social thought or, more specifically, Catholic social doctrine (CSD).

Someone has suggested that CSD is the Catholic Church's "best kept secret."[18] Perhaps, but Glendon at least does not keep it a secret. CSD is openly and notoriously the tradition from which, above all, she studies and judges the social problems of our day and evaluates other traditions, such as the American legal tradition, through which we tackle, or fail to tackle, those problems. In a world thick with traditions in turmoil, Glendon finds CSD in good working order as a discourse with which to pursue answers to our vital human questions. But what work, exactly, do key concepts of Catholic social doctrine do, or fail to do, in Glendon's work? What is the analytical payoff of such building-block concepts as natural law, natural rights, the common good, and subsidiarity, which, with the exception of human rights, are not commonplaces of mainstream analysis?

And there remains that nagging question: What does it mean to satisfy the "unrestricted desire to know?"

[16] *Id.*
[17] *Id.* at 403.
[18] *See* EDWARD P. DEBERRI ET AL., CATHOLIC SOCIAL TEACHING: OUR BEST KEPT SECRET (2003).

III. *The Traditional View: A People Governed by Higher Law*

The literature sometimes uses interchangeably the similar expressions Catholic social *thought* and Catholic social *doctrine*, but it is the latter that is more often used to refer to the authoritative social teachings of the Magisterium of the Catholic Church.[19] Catholic theologians, philosophers, social scientists, poets, musicians, and painters all have their respective contributions to make to Catholic social thought, including, indirectly, to the work of the Magisterium. But that magisterium itself has been working out a body of socio-political doctrine that, in virtue of its source, deserves the special attention of Catholics. Magisterial Catholic social doctrine is the result of a titanic shift. "Whereas for centuries the crucial issues for religious thought were the great theological controversies centered on the dogmas of faith," Jacques Maritain observed in the middle of the last century, "the crucial issues will now deal with political theology and political philosophy."[20] The Magisterium's social doctrine draws on the work of many, including that of the Pontifical Academy of the Social Sciences, but it stands apart because of the authority of its provenance. It is an authoritative tradition of inquiry into how society is, and should be, created, structured, and, yes, governed.

That magisterial tradition traces its proximate roots to the pontificate of Pope Leo XIII (r. 1878-1903). It is not the case, of course, that the Magisterium did not teach on social matters prior to Leo's pontificate, but in an earlier, largely static social order, there was perhaps less to be said. When, from the early nineteenth century onward, industrial revolution and political revolution of various stripes combined to disestablish the old order, Catholic thinkers, both lay and clerical, began to diagnose the emergent social problem and, with courage and creativity, to prescribe a range of new remedies.[21] The acknowledgment that there was a problem—what came to be called "the social question"—was new, and the popes were slower than others to grant it. Pope Leo's predecessor, Pope Pius IX (r. 1846-1878), who had grudgingly surrendered the papal states to those bent on producing a unified Italian state, surely did not share it: truly Christian *society* was already in place, at least where revolution and other usurpations had not already worked their rot. No changes, no problems.

Shortly before his death, however, Pius acknowledged that his ways had been tried, and had failed—and his successor did not need convincing. Leo judged decisively that the newly manifest social order, the final shape of which was not an

[19] *See* Kenneth R. Himes, *Introduction* to MODERN CATHOLIC SOCIAL TEACHING: COMMENTARIES AND INTERPRETATIONS 5-6 (Kenneth R. Himes ed., 2005) (explaining the role of the documents that make up Catholic social teaching); Russell Hittinger, *Introduction to Modern Catholicism*, *in* THE TEACHINGS OF MODERN ROMAN CATHOLICISM ON LAW, POLITICS AND HUMAN NATURE 3, 11 (John Witte Jr. and Frank S. Alexander eds., 2007) (describing the makeup and origin of Catholic social doctrine).

[20] JACQUES MARITAIN, THE RANGE OF REASON 94-95 (1952).

[21] *See* Michael J. Schuck, *Early Modern Roman Catholic Social Thought, 1740-1890*, *in* MODERN CATHOLIC SOCIAL TEACHING: COMMENTARIES AND INTERPRETATIONS 99-124 (Kenneth R. Himes ed., 2005); PAUL MISNER, SOCIAL CATHOLICISM IN EUROPE: FROM THE ONSET OF INDUSTRIALIZATION TO THE FIRST WORLD WAR (1991); JOE HOLLAND, MODERN CATHOLIC SOCIAL TEACHING: THE POPES CONFRONT THE INDUSTRIAL AGE 1740-1958 (2003).

accomplished fact, called on the Church to develop in a systematic and sustained way her latent competencies on the human person in his social dimensions, that is, in the reality of his life on earth en route to everlasting life. In time, The Church would eventually come to describe herself as an "expert in humanity."[22]

The primary vehicle of CSD was to be the encyclical letter, which is an open communication by the pope to specified, and usually very large, groups, including "all people of good will."[23] The popes' practice of publishing such letters long predates Leo's time, but from 1878 until the present the popes have been authoring a steady flow of documents, most of them in the form of the encyclical, that constitute most of the core of CSD. It is customary to refer to an encyclical by its first words in Latin. By 1931, when Pope Pius XI issued the encyclical *Quadragesimo Anno* in celebration of the fortieth anniversary of Leo's most important encyclical on social questions (as to which, more below), Pius XI thought of himself as inheriting, and contributing to, "doctrine" (doctrina), "handed on" (*tradita*) from the time of Leo.[24] The motto of Leo's papacy is revealing: "*vetera novis augere et perficere*,"—to increase and perfect the old with the new.[25] It was a work in progress, a living tradition. In several landmark documents promulgated by the Second Vatican Council (1962-65), the Church, acting in her most authoritative way, consolidated and developed the doctrine.

That process has continued down to the present, and recently the Pontifical Council on Justice and Peace published *The Compendium of the Social Doctrine of the Catholic Church*, with the aim of giving "a concise but complete overview of the Church's social teaching."[26] It is a rich and indispensable, if uneven, compilation and synthesis of more than a century of learning and teaching. According to the *Compendium*:

> The Church's social doctrine was not initially thought of as an organic system but was formed over the course of time, through the numerous interventions of the Magisterium on social issues. . . .[27]
>
> . . . .
>
> . . . Insofar as it is part of the Church's moral teaching, the Church's social doctrine has the same dignity and authority as her moral teaching. It is *authentic Magisterium*, which obligates the faithful to adhere to it.[28]

[22] PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH ¶ 61 (2004) (italics altered).

[23] Hittinger, *supra* note 19.

[24] *Id.* at 12-13.

[25] The phrase signifying the program Pope Leo XIII first initiated in his encyclical AETERNI PATRIS [ON THE RESTORATION OF CHRISTIAN PHILOSOPHY] (1879). *See* LONERGAN, *supra* note 8, at 747.

[26] Cardinal Renato Martino, *Presentation* to PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH xxi, xxi (2004).

[27] PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, *supra* note 24, at ¶ 72 (italics altered).

[28] *Id.* ¶ 80 (italics altered).

While highlighting that the doctrine has developed over time, the *Compendium* adds that "this doctrine has it own profound unity."[29]

Perhaps, but those learned in CSD disagree about whether it enjoys the degree of unity that some claim for it, and if does, in exactly what that unity consists. St. Bonaventure (1221-1274) developed a Christian philosophy that no follower of the philosophy of St. Thomas Aquinas (1225?-1274) could affirm *in toto* (just to pick two among countless possible examples). It would be nothing short of miraculous if the legitimate diversity that has always characterized Catholic philosophizing and theologizing vanished when the question presented is man's socio-political tasks. Among the candidates for CSD's unity are, among others, natural law, human dignity, and a theologically-inspired communitarian understanding of self and society.[30]

Whatever the verdict on the question of unity, though, the particular approach pursued by Pope Leo, starting as soon as he was elected pope, assured the thought of Thomas Aquinas a special place in the body of Catholic social doctrine. Each of Leo's successors has, in turn, added to his legacy, some of them in a more Thomistic manner than others.

Already in his first encyclical, *Inscrutabili*, published the year he was elected and directed against the evils of contemporary society, Leo identified the study of philosophy as one partial remedy to those evils, and he singled out by name "the great Augustine and the Angelic Doctor,"[31] that is, Thomas Aquinas. A year later, *the* programmatic encyclical of his pontificate, *Aeterni Patris*, "On the restoration of Christian Philosophy," reached the following crescendo:

> While, therefore, We hold that every word of wisdom, every useful thing by whomsoever discovered or planned, ought to be received with a willing and grateful mind, We exhort you, venerable brethren, in all earnestness to restore the golden wisdom of St. Thomas, and to spread it far and wide for the defense and beauty of the Catholic faith, for the good of society, and for the advantage of all the sciences. The wisdom of St. Thomas, We say; for if anything is taken up with too great subtlety by the Scholastic doctors, or too carelessly stated—if there be anything that ill agrees with the discoveries of a later age, or, in a word, improbable in whatever way—it does not enter Our mind to propose that for imitation to Our age. Let carefully selected teachers endeavor to implant the doctrine of Thomas Aquinas in the minds of students. . . . lest the false for the true or the corrupt for the pure be drunk in, be ye watchful that the doctrine of Thomas be drawn from his own fountains, or at least from those rivulets which, derived from the very fount, have thus far flowed, according to the established agreement of learned men, pure and clear . . . .[32]

[29] *Id.* ¶ 72.

[30] *See*, *e.g.*, MICHAEL J. SCHUCK, THAT THEY BE ONE: THE SOCIAL TEACHINGS OF THE PAPAL ENCYCLICALS 1740-1989 173-89 (1991) (discussing possible theories of unity).

[31] POPE LEO XIII, INSCRUTABILI DEI CONSILIO [ON THE EVILS OF SOCIETY] ¶ 13 (1878).

[32] POPE LEO XIII, AETERNI PATRIS [ON THE RESTORATION OF CHRISTIAN PHILOSOPHY] ¶ 31 (1874).

The reference to rivulets is to those who came after Thomas and tried to apply and develop his learning; Leo himself was very much in the debt of certain creative nineteenth-century Thomists.

While Leo sought the (critical and creative) restoration of the *whole* St. Thomas, as it were, it was above all with social and practical, rather than theoretical, matters that that pope was concerned. Again, the "social question" demanded as much of the Church. The most celebrated encyclical of Leo's pontificate, *Rerum Novarum*, "On the Condition of Labor", the one that is widely (and mostly correctly) regarded as the beginning of CSD, was, in essence, an application of the principles of the theology and philosophy of St. Thomas to the social problems of the day.[33] Aquinas is the only Scholastic cited by Leo in the encyclical.

The thought of Thomas, as anyone who has bothered to try to "reach[] up to the mind of Aquinas"[34] knows, is not reducible to a formula, which is part of the reason why one should be nervous about talking too confidently about Thom*ism*. One can, however, identify the principles and concepts, notions and ideas that are central to his thinking, and preeminent among them is the judgment that God even now continues to *govern* the whole of his creation, including even us rational and (still) free human persons, through law.[35] St. Thomas explains that

> [f]oolish . . . was the opinion of those who said that the corruptible lower world, or individual things, or that even human affairs, were not subject to the Divine government. . . . [A]bove the government whereby the rational creature governs itself as a master of its own actions, it requires to be governed by God.[36]

And God governs, according to St. Thomas, through the eternal law:

> Now it is evident, granted that the world is ruled by Divine Providence . . . that the whole community of the universe is governed by Divine Reason. Wherefore the very Idea of the government of things in God the Ruler of the universe, has the nature of a law. And since the Divine Reason's conception of things is not subject to time but is eternal, . . . therefore it is that this kind of law must be called eternal.[37]

Furthermore, we humans have a particular and distinctive share in that governance:

> [S]ince all things subject to Divine providence are ruled and measured by the eternal law, . . . it is evident that all things partake somewhat of the eternal law, in so far as, namely, from its being imprinted on them, they derive their respective inclinations to their proper acts and ends. Now among all others, the rational creature is subject to Divine providence in the most excellent way, in so far as it partakes of a share of providence, by

[33] *See* POPE LEO XIII, RERUM NOVARUM [ON CAPITAL AND LABOR] ¶¶ 3, 10, 11, 12, 25, 26, 34, 35, 36 (1891).

[34] LONERGAN, *supra* note 8, at 748.

[35] For a different account of the place of law in Thomas's ethical and political thought, see E.A. Goerner, *On Thomistic Natural Law*, *in* 7 POLITICAL THEORY 101 (1979).

[36] THOMAS AQUINAS, SUMMA THEOLOGICA I, Q. 103, Art. 5 (Fathers of the English Dominican Province trans., Benziger Brothers 1948).

[37] *Id.* at I-II, Q. 91, Art. 1.

> being provident 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 . . . . It is . . . evident that the natural law is nothing else than the rational creature's participation of the eternal law.[38]

With the help of grace, natural law is, in addition to the divine positive law, the measure of human action to which the acting person must conform. There is simply no exaggerating the importance to the Leonine-Thomistic synthesis of the proposition that we humans are always already *under law*—the divine law and, yes, the natural law that is inserted into the minds of all rational persons to be known naturally and obeyed freely.[39] In Leo's judgment:

> Laws come before men live together in society, and have their origin in the natural, and consequently in the eternal, law. The precepts, therefore, of the natural law, contained bodily in the laws of men, have not merely the force of human law, but they possess that higher and more august sanction which belongs to the law of nature and the eternal law.[40]

But what of the "unrestricted desire to know?"

IV. *The Profile of Natural Law*

Natural law was central to the Leonine project because it was central to the Thomistic theory of the divine governance,[41] and the natural law has appeared as a basis of argument in almost every one of the social encyclicals from Leo's day down to our own. "Natural law has been an essential component of Catholic ethics for centuries and it will continue to play a central role in the Church's reflection on social ethics."[42] It figures prominently in Pope Benedict XVI's first encyclical *Deus Caritas Est*: "[t]he Church's social teaching 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."[43] And the *Compendium* states unequivocally that "the exercise of freedom," on the part of every acting person, "implies a reference to a natural moral law, of a universal character, that precedes and unites all rights and duties. The natural law," the *Compendium* continues (quoting Aquinas) "'is nothing other than the light of intellect infused within us by God. Thanks to this, we know what must be done and what must be avoided. This light or this law has been given by God to creation.'"[44] It adds (citing

[38] *Id.* at I-II, Q. 91, Art. 2.

[39] *See id.* at I-II, Q. 90, Art. 4.

[40] POPE LEO XIII, LIBERTAS [ON THE NATURE OF HUMAN LIBERTY] ¶ 9 (1888).

[41] The reverse is probably true as well.

[42] *See* Stephen J. Pope, *Natural Law in Catholic Social Teachings*, *in* MODERN CATHOLIC SOCIAL TEACHING: COMMENTARIES AND INTERPRETATIONS 41, 63 (Kenneth R. Himes ed., 2005).

[43] POPE BENEDICT XVI, DEUS CARITAS EST [ON CHRISTIAN LOVE] ¶ 28 (2005).

[44] PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, *supra* note 22, ¶ 140 (quoting Aquinas in II Thomas Aquinas, *In Duo Praecepta Caritatis et in Decem Legis Praecepta Expositio*, *in* Opuscola Theologica 245, 245 (Marietti ed., Taurini 1954)).

Aquinas): "It consists in the participation in his eternal law, which is identified with God himself.[45]

Natural law, even if it does not provide a unifying principle for all of CSD, is unmistakably central to that tradition. But what of the place of the natural law in Glendon's work? Does she argue on the basis of *the natural law*?

Before attempting an answer, an obvious point of caution. Neither explicit mention of the natural law nor omission of the expression is dispositive of the role of the idea in Glendon's—or anyone else's—thought. *Moreover* (as Russell Hittinger has commented), "[t]he basis of the moral order will not stand or fall on whether, or to what extent, we use the words 'natural law.'"[46] The fact is, though, that in *Traditions* Glendon both mentions and fails to mention the natural law in ways that raise some interesting questions about the conception of the foundation of the moral order that she commends to her readers, both implicitly and explicitly. I begin by marshalling the meager evidence, then I ask what it may mean.

First, in a *tour de force* chapter in which Glendon takes the measure of Rousseau's thoroughly baneful impact on the development of moral and social thought in the eighteenth century, Glendon writes:

> Together with early modern and Enlightenment thinkers, he rejected older ideas of a natural law discoverable through right reason. . . .
>
> . . .
>
> . . . He learned enough from the ancient Greeks to mount a powerful critique of narrow scientific rationalism, but not enough to appreciate the more capacious form of reason that gave the classical and biblical traditions alike their dynamism. Like the Enlightenment figures he criticized, Rousseau rejected the moral and intellectual traditions that had nourished his own genius, throwing out the *ratio* of natural law along with modern scientific reason. He thus failed to see that what he called "perfectibility" was rooted in man's innate desire to know, the desire that gives rise to the never-ending, recurrent operations of questioning, experiencing, understanding, and choosing.[47]

Second, thirteen of *Traditions*' chapters are devoted primarily or exclusively to the topic of human rights. Glendon's celebrated first book on rights, *Rights Talk* (1991), offered a much-needed critique of how rights are today conceived of, deployed, and adjudicated (both formally and informally), especially in the United States. From that largely (though by no means thoroughly) cautionary tale of moral argument that sounds in terms of rights, Glendon proceeded to a celebration of rights and their declaration in *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001). As the title indicates, it is a study of the making and interpreting of the United Nations' 1948 Universal Declaration of Human Rights.

[45] *Id.* (citing Aquinas, *supra* note 36, at I-II, Q. 91, Art. 2).
[46] RUSSELL HITTINGER, THE FIRST GRACE 35 (2003).
[47] GLENDON, *supra* note **Error! Bookmark not defined.**, at 37-43.

The chapters of *Traditions* that concern the Universal Declaration, of which Glendon is a stalwart admirer, describe a reciprocal relationship between the Declaration and CSD, each shaping the other. It is an interesting, important, and well-told story about the Catholic influences on the drafting of the Declaration. Glendon explains that:

> Catholics acquainted with the Church's social doctrine . . . will find [in the Universal Declaration] more than a few familiar ideas: the emphasis on the "inherent dignity" and "worth of the human person"; the affirmation that the human person is "endowed with reason and conscience"; the recognition of the family as the "natural and fundamental group unit of society" entitled as such to "protection by society and the state"; the insistence that certain economic and social goods are "indispensable" for human dignity; that parents have a prior right to choose the education of their children; and that motherhood and childhood are entitled to "special care and assistance."[48]

What one will not find, however—because it is not there in the Declaration—is any mention whatsoever of natural law. When Glendon then turns to the other side of the reciprocal shaping, the focus is on how Catholics came to support a declaration of rights that appeared to *pace* much of the Thomistic tradition, yet remained unmoored from natural law:

> There is an intriguing sentence in the part of René Cassin's memoirs where he describes the efforts of the Human Rights Commission to secure support from as many nations as possible when the Declaration was presented for adoption by the U.N. General Assembly at its Paris session in the fall of 1948. According to Cassin, the Commission was aided on several occasions by the "discreet personal encouragements" of the Papal Nuncio in Paris, one Angelo Roncalli. The future John XXIII must have agreed with [Jacques] Maritain and other Catholic thinkers that there was value in discussing certain human goods as rights, even though the language of rights could never be the mother tongue of Christians. For when he became pope, he described the [Declaration] as "an act of the highest importance."
>
> Many Catholics were surprised, and some were even shocked, at the extent to which the documents of Vatican II, and John XXIII's encyclicals *Pacem in Terris* [1961] and *Mater et Magistra* [1963] seemed to effect a shift from natural law to human rights. I agree with those who regard this shift as more rhetorical than theoretical, an effort on the part of the Church to make her own teachings intelligible to "all men and women of good will."[49]

As Glendon proceeds to acknowledge the risks associated with that shift, she chides its critics for not sufficiently appreciating that "the new terminology of rights is closely connected to traditional teachings concerning obligations."[50] The Jacques Maritain whom she mentions was one of the twentieth century's most gifted Thomists

[48] *Id.* at 350.
[49] *Id.* at 352-53.
[50] *Id.* at 354.

and an ardent champion of natural rights; he found those rights in natural law, a point to which we shall return.[51]

Third and finally, comparing sources of rights-talk in Europe and in early America, Glendon mentions "an older, more universalist natural law tradition"[52] that has been influential in shaping a distinctive form of rights discourse in Latin American nations. Glendon relies on the work of Paolo Carozza, which traces that discourse to "Thomistic moral philosophy."[53] A footnote quotes legal historian Brian Tierney to the effect that the process was owing to "systematic grafting of the juridical language of Roman and canon law onto Aquinas's teaching on natural law."[54]

This, then, is what gets said about the natural law in *Traditions.* What is one to make of it? That is, what do these thin but possibly pregnant statements, along with *Traditions* as a whole, teach us about what Glendon thinks the natural law is and does? What place does the CSD lodestone of "natural law" hold in Glendon's thinking?

The third clue would seem to be of little or mostly negative value. Reporting a historical phenomenon, it acknowledges a "tradition" on which Glendon does not, in this context, take a position.

The second clue, for its part, establishes that Glendon considers that the Church, at least in the landmark encyclicals that were conspicuous for their talk of human rights, remain rooted in the theory of natural law. In the earlier and less theoretical encyclical, *Mater et Magistra*, Blessed Pope John XXIII preferred to proceed from the dignity of the human person.[55] However, in the latter encyclical, *Pacem in Terris*, which has been fairly described as a "compendium of twentieth-century Catholic social, legal and political thought,"[56] the natural law is the very starting point of the analysis: "the laws governing [the relationships between men and states] are to be sought . . . where the Father of all things wrote them, that is, in the nature of man."[57] Pope John returns over and over to the theme of natural law. The natural law is said to be the source of human rights.[58] Pope John clarifies what he means by the natural law by citing the encyclicals of Popes Leo, Pius XI, and Pius XII, as well as the texts of Aquinas.[59]

[51] *See* JACQUES MARITAIN, THE RIGHTS OF MAN AND NATURAL LAW (Doris C. Ahson trans., Charles Scribner's Sons 1943).

[52] GLENDON, *supra* note **Error! Bookmark not defined.**, at 389.

[53] *Id.* at 389 (citing Paolo Carozza, *From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights*, 25 HUM. RTS. Q. 281 (2003)).

[54] *Id.* at n.31 (quoting BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW 1150-1625 287 (1997)).

[55] *See* POPE JOHN XXIII, MATER ET MAGISTRA [CHRISTIANITY AND SOCIAL PROGRESS] ¶¶ 83, 211, 220 (1961).

[56] Hittinger, *supra* note 19, at 23.

[57] POPE JOHN XXIII, PACEM IN TERRIS [ESTABLISHING UNIVERSAL PEACE IN TRUTH, JUSTICE, CHARITY, AND LIBERTY] ¶ 6 (1963).

[58] *See id.* ¶¶ 13, 28.

[59] Aquinas on the natural law is cited in ¶¶ 27, 35.

Which brings us to the first clue. Acknowledged are "older ideas" according to which "natural law" is discovered through—though not identified with—"right reason."[60] Aligned with these older ideas is a "more capacious form of reason" than "narrow scientific rationalism."[61] At the end of this brief discussion, it would seem that Glendon then proceeds to identify the natural law with *ratio* or reason, which she in turn understands as growing out of "man's innate desire to know, the desire that gives rise to the never-ending, recurrent operations of questioning, experiencing, understanding, and choosing."[62] I say "seem," because what is being said is not clear.

It would be easy to let this apparent identification slide, for by the time one is a fraction of the way through *Traditions*, the expression has become utterly familiar through uncelebrated repetition. Variations on this locution, about the human desire to know and the operations by which that desire is satisfied, appear (by my rough count) a dozen times in *Traditions*.

One wonders, though, whether these variations are not destined to be confusing or unsatisfying to many readers, specifically those readers who do not know the philosophical work in which they find their meaning and justification. I refer to the work of Bernard Lonergan, of whom Glendon writes: "Just as Thomas Aquinas performed an inestimable service for the theology of his day by assimilating the best of ancient and contemporary thought, Lonergan has laid the foundations for a twenty-first century theology that both learns from and challenges the modern natural and human sciences."[63]

Lonergan's life's work was to understand human understanding. "Thoroughly understand what it is to understand," Lonergan writes at the beginning of his magnum opus *Insight: A Study of Human Understanding* (1958), "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."[64] Glendon has taken Lonergan as her guide to human understanding, but not everyone has. Questioning, experiencing, understanding, and choosing—these are ordinary English gerunds but they are also Lonergan's terms of art. The results of Lonergan's gnoseology are everywhere operative in Glendon's work, but without systematic and contextual introduction, those results can fail to get the new work done.

For example, what does it mean to identify as the "natural law" "the never-ending, recurrent operations of questioning, experiencing, understanding, and choosing?" Why, for example, should we accept the proposition that the operations of our cognition and the desire that animates them are what the tradition identified as "a participation in the eternal law?" (The Divine Mind asks no questions, at least in any

[60] GLENDON, *supra* note **Error! Bookmark not defined.**, at 37.
[61] *Id.* at 42.
[62] *Id.* at 43.
[63] *Id.* at 408.
[64] LONERGAN, *supra* note 8, at xxviii.

obvious sense. Omniscience arrived first). Again and still, what does it mean to satisfy "the unrestricted desire to know?" What part might it play in the divine government?

Glendon is engaged in the beneficial task of applying the notoriously technical philosophizing of Lonergan to contemporary questions of moment. With rare exception, Lonergan's genius has lacked students who can both understand the implications of his understanding of understanding and then go on to show its implications and applications. Glendon is one of those exceptions, possessed as she is of an acute grasp of our world and of what Lonergan's transcendental Thomism (a description Lonergan resisted) might mean for that world. The reader who does not know more Lonergan than Glendon reveals *en passant*, however, may find that the conversation lacks closure. Michael Novak, for example, has argued that Lonergan's method of human understanding should be understood as the "new" natural law, but that's not a case Glendon makes anywhere in *Traditions*.[65]

V. *The appearance of natural rights*

The relationship, if any, between natural law and natural rights has a complex and much-disputed history. There are those such as Alasdair MacIntyre who hold that there "are no [natural human] rights, and belief in them is one with belief in witches and unicorns."[66] There are also those such as Maritain who maintain that "[t]he same natural law which lays down our most fundamental duties . . . is the very law which assigns to us our fundamental rights."[67] The popes from Leo to the present have taught that humans are possessed of natural rights.

And it is here that the argument joins, at least in part. Whatever her position on the natural law, there is no mistaking the fact that Glendon stands on the side of natural human rights. But on what grounds?

Human rights, as already mentioned, are more or less the principal topic of thirteen chapters of *Traditions*, and several of those chapters take up various aspects of the drafting the Universal Declaration. One of those is alluded to in our second clue to Glendon's conception of natural law. Jacques Maritain, though not a drafter of the Declaration, was an influential member of the United Nations Economic and Social Council (UNESCO) committee appointed to study the theoretical foundations of human rights. In describing the work of a UNESCO National Committee, Maritain infamously explained that "someone expressed astonishment that certain champions of violently opposed ideologies had agreed on a list of [human] rights. 'Yes,' they

[65] *See* Michael Novak, *Bernard Lonergan: A New Approach to Natural Law*, 41 PROC. OF THE AM. CATHOLIC PHIL. ASS'N. 246 (1967).

[66] ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY ON MORAL THEORY 69 (2nd ed. Univ. of Notre Dame Press 1984); s*ee also* GLENDON, *supra* note **Error! Bookmark not defined.**, at 316.

[67] JACQUES MARITAIN, MAN AND THE STATE 95 (1951).

said, 'we agree about the rights *but on condition that no one asks us why*. That 'why' is where the argument begins.'"[68]

Argument, of course, is not an univocal term. There is the destructive sort of argument, and there are as well the arguments that we can make to defend the positions we ourselves take and perhaps wish that others would take. While Glendon praises the accomplishment of the 1948 Declaration, she stresses the importance of finishing the work—the work *deliberately* left undone by the framers of the Declaration—of showing how the declared rights can be grounded "in the world's major philosophical and religious traditions."[69] She further concludes that it is up to the world's religions to show, each from within the resources of its own tradition, why it is true that humans possess the fundamental rights declared in 1948.[70] The task identified, in other words, is the one of making the arguments that sound in terms of particular traditions, support the deliberately Esperantist rhetoric on which the Declaration's framers could agree.

With influential Catholic philosophers such Maritain and MacIntyre taking diametrically opposed positions on the question of whether or not natural human rights exist, the Catholic finds herself in an odd position. There is no denying that the Magisterium of the Church has been out in front, from Leo XIII to Benedict XVI, in her insisting that humans by nature possess fundamental rights. "The pleasure the Catholic might find in mocking growing lists of human rights is dimmed when he finds the Magisterium addressing him with this same language."[71] Glendon observes that the Magisterium's declarations of human rights increasingly point to "human dignity" as the source of said rights, rather than to the natural law, as Maritain had.[72] In this the Church mirrors the Declaration, whose "ur" principle it has been said, is human dignity.[73]

Though Glendon does not mention this fact, Bernard Lonergan concluded that "[t]he source of natural right lies in the norms immanent in human intelligence, human judgment, human evaluation, human affectivity."[74] In other words, natural rights issue from judgments, which satisfy the unrestricted natural desire to know about what either universally or particularly is good or bad for human beings, and what is judged to be good or bad involves intentional response to feelings (affectivity). In still other words, Lonergan's notion of natural right depends on the understanding of understanding on which all else is, as he sees things, predicated. And that understanding of understanding, though adumbrated here and there in

[68] Jacques Maritain, *Introduction* to HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS 9 (UNESCO ed., 1949).

[69] GLENDON, *supra* note **Error! Bookmark not defined.**, at 335.

[70] *Id.* at 347.

[71] Ralph McInerny, *Natural Law and Human Rights*, 36 AM. J. JURIS. 1, 12 (1991)

[72] GLENDON, *supra* note **Error! Bookmark not defined.**, at 346-47, 392.

[73] *Id.* at 336 (citing Louis Henkin, *The Ideals of Human Rights: Ideology and Aspiration, Reality and Prospect*, *in* REALIZING HUMAN RIGHTS 3,11 (2000)).

[74] Bernard Lonergan, *Natural Right and Historical Mindedness*, 15 PROC. OF THE AM. CATHOLIC PHIL. ASS'N. 132 (1977), *reprinted in* A THIRD COLLECTION: PAPERS BY BERNARD LONERGAN, at 176 (Frederick Crowe ed. 1985).

Traditions, never emerges in a way that would allow the reader, or at least some readers, to begin to catch on and judge for themselves.

This is not to find fault with a collection of scintillating occasional pieces—mercifully, none of the occasions was an apt forum for working out the kind of argument that Lonergan mounts in the seven hundred and forty eight pages of *Insight*. It is to suggest, though, that for some readers to judge Glendon's conclusions, they will need to turn to Lonergan or to some other thinker who can assist him in the work of coming to the understanding of understanding on which Glendon depends, and on which her notions of natural law and natural rights in turn depend.[75] Glendon, I feel sure, would not be other than gratified to know that this has occurred.

I suggested at the beginning that Glendon comes out to meet us where we are. That is true as far as it goes, but I believe that it is not quite the whole story. It seems to this reader at least that sometimes Glendon does not take the last (or is it the first?) steps that are necessary to make it probable that the meeting will occur, at least on a more than superficial level. To be sure, readers have to be curious and engaged in the potential conversation; they need to take responsibility rather than wait to be told what's up; no writer can meet all possible readers. However, if—as I believe—Glendon is correct that that any meaningful conversation is necessarily tradition-dependent, its potential success depends on interlocutors' taking up the conversation in the tradition's terms. This does not mean that those terms are fixed and immutable; indeed, quite the contrary. But for understanding to go forward and potentially correct what has come before, the interlocutors need to be talking about the same thing.

Natural law and natural rights are some of the principal terms of art in the tradition of CSD. The "unrestricted desire to know," however, has not been mentioned in a magisterial document. It might well be the case that the questions that animate the CSD tradition would be better approached and answered through a translation of the traditional terms into those inspired by Lonergan. That may very well be what Glendon is up to, in fact. In order to encapsulate what people of intelligence are to do when their traditions are in turmoil, she quotes Lonergan:

> 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 new; and painstaking enough to work out one at a time the transitions to be made.[76] (xii).

Glendon indeed does the painstaking work, and it is unfailingly fortifying to benefit from her achievements, even where the reader would work out the transitions

[75] *See* JOSEPH FLANAGAN, QUEST FOR SELF-KNOWLEDGE: AN ESSAY IN LONERGAN'S PHILOSOPHY (1997) (for an outstanding analysis of Lonergan).

[76] GLENDON, *supra* note **Error! Bookmark not defined.**, at xii (Quoting an essay by Bernard Lonergan, *reprinted in* COLLECTION: PAPERS BY BERNARD LONERGAN 266 (Frederick Crowe ed. 1985)).

somewhat differently. The "transitions" that need to be made "one at a time" cannot, except at our peril, fail to take account of and respond to the markers already laid down, translating them if necessary, and potentially correcting them and following the desire to know where it leads.[77]

VI. *State, Society, the Common Good, and Subsidiarity*

When he began the spade work that would in time produce the beginnings of CSD, Pope Leo XIII faced an ominously troubled Europe, not just the papacy's loss of real estate. Industrial capitalism was taking over everywhere on the ground, and, in a new way, people found themselves hungry and abused. Simultaneously, new ideas were vying to shape the newly rising social and state orders. Those ideas were, above all, liberalism and socialism. Relevantly, liberalism stood for the idea that the individual was the primary (or exclusive) unit, and that the individual should be free, including against the Church. And socialism stood, relevantly, for the idea that property should be divided equally among all (by an atheistic state).

The Catholic position that emerged, in fits and starts from Leo to the present, rejects both liberalism and socialism, while appropriating elements of each. For present purposes I am interested not in what the Church learned from socialism about property, but in what the Church learned—and did not learn —from liberalism. It was from the latter, under the specter of the growth of modern states with aspirations to sovereignty, that the Church learned to celebrate the fundamental rights of human persons.

But if, as we have seen, the Church today is one of the world's great champions of individual rights (properly understood), she is also the defender of rights that the classical liberal has been keen to deny. I refer to the rights of *groups* or *societies*. Perhaps the single greatest and certainly a characteristic power-grab of the modern liberal "sovereign" state is to insist that groups/societies such as families and churches have a right to exist *only if* the state grant that right.[78]

The view of CSD, by contrast, is that the state, whatever form it happens to assume, must accept the existence of the family and the Church and certain other groups, for these associations have a right to exist and to exercise appropriate freedom. According to Pope Leo:

> Private societies, . . . although they exist within the body politic, and are severally part of the commonwealth, cannot nevertheless be absolutely, and as such, prohibited by public authority. For, to enter into a "society" of this kind is the natural right of man; and the State has for its office to protect natural rights, not to destroy them; and, if it forbid its

[77] James Boyd White opines that "[i]t is [Glendon's] own performance in her writing that is in the end the best definition of and argument for the position she recommends." James Boyd White, *Looking at our Language: Glendon on Rights,* 90 MICH. L. REV. 1267, 1275 (1992).

[78] *See* Russell Hittinger, *Society, Subsidiarity, and Authority in Catholic Social Thought*, *in* Civilizing Authority 119, 125-26 (Patrick McKinley Brennan ed., 2007).

> citizens to form associations, it contradicts the very principle of its own existence, . . . namely, the natural tendency of man to dwell in society.[79]

The rights of such groups limit what the state can do and where it can do it. The authority possessed by a rights-bearing society must be respected.

And this brings us to the heart of CSD's understanding of the role of the state, that is, of (what I shall refer to as) government. CSD refuses to be libertarian with respect to the role of government. While insisting that government is *both* necessarily *and* prudentially *limited*, CSD also recognizes that government has important and essential work to do. "Throughout the spectrum of social Catholicism," as one scholar of CSD explains, "Catholic ideologies have never assumed that that state is best which governs least. Classic Catholic views maintain a strong statist expectation. Catholic social teaching, following the classical tradition, holds governments responsible for the well-being of society."[80] That "well-being" has traditionally been referred to as the *common good*, that is, not only the good that is proper to individuals taken one by one but also, and preeminently, the good that is common to the group.

To every manifestation of society (family, social groups, corporations, clubs, churches, and such) there is a common good, and as the *Compendium* explains, "[n]o expression of social life . . . can escape the issue of its own common good, in that this is a constitutive element of its significance and the authentic reason for its very existence."[81] When it comes to attaining the common good of specifically *political* society, this is what the *Compendium* has to say:

> The responsibility for attaining the common good, besides falling to individual persons, belongs also to the State, since the common good is the reason that the political authority exists. The State, in fact, must guarantee the coherency, unity and organization of the civil society of which it is an expression . . . .
>
> To ensure the common good, the government of each country has the specific duty to harmonize the different sectoral interests with the requirements of justice. The proper reconciling of the particular goods of groups and those of individuals is, in fact, one of the most delicate tasks of public authority.[82]

According to CSD as set out in the *Compendium* (and its sources), then, government exists in order to assist in the achievement of the common good of a particular political society, which encompasses the respective common goods of the various included societies or groups such as families and churches, as well as the goods proper to individuals as such. Government is always limited *inter alia* by the rights of individuals and groups, but its work may indeed be substantial, depending on the needs of a given political society. CSD, in its attention to the common good of

[79] POPE LEO XIII, *supra* note 33, ¶ 51.

[80] John Coleman, *Neither Liberal Nor Socialist: The Originality of Catholic Social Teaching*, *in* COLEMAN, ONE HUNDRED YEARS OF CATHOLIC SOCIAL THOUGHT 25, 34 (1991).

[81] PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, *supra* note 27, ¶ 165.

[82] *Id.* ¶¶ 168, 169.

political society, offers an important corrective to the contemporary historical theories that regard government as the servant of the simple sum of individual wills, the truly *common* good nowhere to be found.

CSD's teaching on government's responsibility for the common good takes on special salience from the fact that, what the *Compendium* makes unmistakably clear, some serious Catholic students of law and politics today deny. John Finnis, to take an eminent example, argues for what he refers to as "the standard modern position," according to which government has a merely "subsidiary" role with respect to political society (and its common good):

> The difference between the standard modern position and the position it has replaced [sic] can be expressed as follows. The standard modern position considers that the state's proper responsibility for upholding true worth (morality) is a responsibility *subsidiary* (auxiliary) to the *primary* responsibility of parents and non-political voluntary associations. The subsidiary character of government is widely emphasized and increasingly accepted, at least in principle, in contemporary European politics. (It was, for example, a cornerstone of the Treaty of Maastrict of 1992). This conception of the proper role of government has been taken to exclude the state from assuming a directly parental disciplinary role in relation to consenting *adults*.[83]

No one (or almost no one) today proposes that government should assume "a directly parental disciplinary role," whether with respect to homosexual sex (Finnis's topic) or anything else. Finnis's expression is unusually tendentious. However, some traditions, including CSD (as I understand it), do hold that the government's responsibility for the common good (which includes the individual goods of the members of the body politic) may require that it take action to prevent personal vice, and in a way that respects others', including the family's, concomitant role in doing the same. The body politic has its own common good, and it is the responsibility of the government to be about that business.[84]

It is at this point that we rejoin Glendon. The concept of the common good (of political society) is nothing short of central in the CSD tradition. The term "common good" does not appear in the index to *Traditions*. Another term that does not receive an index entry there is "civil society," and the latter is a concept that is one of the most important in Glendon's analysis. Civil society, as Glendon explains in the chapter titled "The Cultural Underpinnings of America's Democratic Experiment," is what the revolutionaries of the eighteenth and nineteenth centuries wanted to eliminate. In the hope of creating a world of equal individuals under the watchful and uninhibited eye of the sovereign state, they mounted "all-out attack on culture-

[83] John Finnis, *Law, Morality, and Sexual Orientation*, 69 NOTRE DAME L. REV. 1049, 1052 (1993-94).

[84] On the possible tension between strong recognition of individual human dignity and the traditional conception of the common good, see Mary M. Keys, *Personal Dignity and the Common Good: A Twentieth- Century Thomistic Dialogue*, *in* CATHOLICISM, LIBERALISM, AND COMMUNITARIANISM: THE CATHOLIC INTELLECTUAL TRADITION AND THE MORAL FOUNDATIONS OF DEMOCRACY 173 (1995).

forming institutions",[85] that is, on the sorts of groups/societies that have been home to us from time out of mind. Out to de-create, or at least to limit, the places where people associate and thus become acculturated, they produced a world in which, as it would turn out, lone(ly) individuals would have to depend for help on (what Toqueville presciently called) "a powerful stranger called the government."[86]

"Civil society, long neglected in political theory and practice," Glendon writes, "is back in vogue."[87] Glendon herself, along with Michael Sandel and others (some of whose work is reviewed or discussed in *Traditions*), has been one of the principal reinvigorators of the idea. But ideas do not equal performance. "Unfortunately," as Glendon notes, "the mediating structures of civil society are not in peak condition" today.[88] Having observed that "[c]entralization of power has lessened opportunities for political participation"[89], she goes on to note:

> An encouraging sign in political theory is the remarkable reawakening of interest (here and in Europe) in the nitty-gritty of federalism; subsidiarity (the principle of leaving social tasks to the smallest social unit that can perform them adequately); and modes of legal ordering other than direct, top-down regulation.[90]

The time has come, in Glendon's judgment, for a new political *practice* that respects and implements a proper understanding of the value of civil society and mediating institutions.[91]

On Glendon's understanding, this would require a more limited role for government than the one with which we Americans have become familiar. Over and over in *Traditions* Glendon inveighs against government that does too much (and too poorly), and she makes a persuasive case for what happens to people who outsource their living to that "powerful stranger called government." It never becomes clear in *Traditions*, however, whether Glendon thinks that government has an essential and not merely instrumental responsibility for the common good, as CSD teaches, or whether she instead joins John Finnis and others in taking the "standard modern position." As with natural law and natural rights, it would be helpful to the reader intent on understanding Glendon—in order to proceed as she recommends or to take an alternative course—to know, more exactly, where she stands vis-à-vis the markers set down by the CSD tradition from which she proceeds and to which she contributes. What *exactly* is government's responsibility for the common good?

Another marker that merits special mention, because of its growing popularity and seemingly unbounded malleability, is "subsidiarity." As we have seen, it figures in both Finnis's and Glendon's respective analyses, and prominently. It figures also, and

[85] GLENDON, *supra* note **Error! Bookmark not defined.**, at 62.
[86] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 110 (Gerald Bevan trans., Penguin Books 2003) (1835).
[87] GLENDON, *supra* note **Error! Bookmark not defined.**, at 127.
[88] *Id.*
[89] *Id.*
[90] *Id.* at 128.
[91] *Id.* at 130.

again prominently, in the tradition of CST. But what it means in CST may be rather different than what it means in Glendon's or Finnis's analysis.

The term was introduced into CSD by Pope Pius XI in *Quadragesimo anno*, who—as Russell Hittinger has shown—was drawing on the work of Luigi Taparelli, one of those nineteenth century "rivulets" of Thomism.[92] The term does indeed appear in the Maastrict Treaty, but with a very different meaning from the one it has in CSD. Space does not permit me to develop here the history and meaning of subsidiarity in CSD, but the following quotation from Russell Hittinger is indicative:

> In its negative formulation, subsidiarity demands that when assistance (subsidium) is given, it be done in such a way that the sociality proper to the group (family, school, corporation, etc.) is not subverted. Taparelli used the term *ipotattico*, taken from the Greek *hypotaxis*—the rules governing the order of clauses within a sentence. Rendered in Latin as *sub sedeo*, subsidiarity evokes the concept of auxiliary troops in the Roman legion that "sat below," ready and duty-bound to render service. Hence, it describes the right (*dritto ipotattico*) of social groups, each enjoying its own proper mode of action. While sometimes identified with the word *subsidium*, (help, assistance), the point of subsidiarity is a normative structure of plural social forms, not necessarily a trickling down or power or aid. Taparelli used the expression *associazione impotattica* to emphasize the interdependence of societies, each maintaining its own unity (*conservare la propria unita*) without prejudice to the whole.
>
> Subsidiarity, however, cannot be construed as judgments, decisions, or actions at the "lowest level." The notion of a "lowest" level perverts the concept of subsidiarity. The better term is *proper* level. The term "proper" is taken from the Latin word *proprium*, denoting what belongs to, or what is possessed by, a thing or person. From *proprium* we derive the word "property." On the modern view of the state, there are only two persons having *propria*: the artificial person of the state, and natural, individual persons. The "lowest" level can mean only the individual, or, perhaps, partnerships that are but aggregations of individuals. Subsidiarity, on the other hand, presupposes that there are plural authorities and agents having their "proper" (not necessarily lowest) duties and rights with regard to the common good—immediately, the common good of the particular society, but mediately the common good of the body politic.[93]

Subsidiarity, as understood in CSD, is not a free-floating principle of devolution; it is not akin to a metaphysical mandate for federalism; it is not a judgment that smaller is better; and it is not a ban on the state's taking appropriate action, consistent with the authority of the family and of other societies, to help create a morally upright body politic.

Though sometimes in *Traditions* subsidiarity emerges as a principle of smallness[94], Glendon also uses subsidiarity as it is understood in CSD. For example, she raises the question "whether the family should or could be treated as a social and legal subject

[92] *See* Hittinger, *supra* note 19, at 15, 22.
[93] *See* Hittinger, *supra* note 78, at 135-36.
[94] *See* GLENDON, *supra* note **Error! Bookmark not defined.**, at 75, 266.

in itself within the framework of subsidiarity (properly understood), rather than merely as a collection of rights-bearing individuals."[95] Unless the family be understood in these terms, that is, as a group person with rights to be what it is, the government of the liberal state will be tempted to re-make the family in its own image.[96] Subsidiarity as understood in CSD presupposes a social ontology, a preexisting distribution of human functions.[97] The occasional deployment of subsidiarity as a principle of smallness or devolution strips it, perhaps unintentionally, of its real traction. Family is to be respected not because it gets the job done well (at a small level), but because by nature the family is a subject of rights and authority to be respected.

Glendon is of the view that the Church's "principle of subsidiarity . . . is already implicit in the Universal Declaration . . . ."[98] That case, I think, remains to be made. But Glendon is surely right that subsidiarity "is an idea that needs to be deepened and developed."[99] And there is no time to waste because, as the popes who were slow to warm to liberalism knew, and as Glendon says, a liberal state will be sorely tempted to impose its "own image on all the institutions of civil society."[100]

VII. *"The Rule of Law?"*

Before concluding, just a few remarks about what gets said in *Traditions* about the rule of law are in order. Glendon's work on how the legal tradition to which we are heirs has functioned and developed is worth careful study; I find it persuasive. The place to start in *Traditions* is Chapter 1, "Tradition and Creativity in Culture and Law."[101] Though *Traditions* is already plenty thick, it is regrettable that Glendon's more ample statement of how intelligence works in our legal tradition did not make it in.[102]

As the quotation from Glendon's Chapter 1 at the beginning of this review essay indicated, Glendon regards the common law method as a textbook example of how a healthy tradition functions. Glendon observes:

> To try to describe that method is a bit like trying to describe swimming or bicycle riding, for it consists of a set of habits and practices that are acquired only by doing. But the conventional understanding goes something like this: The common law judge is supposed

[95] *Id.* at 249.

[96] *Id.* at 96, 73.

[97] Russell Hittinger, *Social Pluralism and Subsidiarity in Catholic Social Thought*, 7 PROVIDENCE: STUDIES IN WESTERN CIVILIZATION 60-61 (2002).

[98] *See* GLENDON, *supra* note **Error! Bookmark not defined.**, at 358.

[99] *Id.* at 359.

[100] *Id.* at 129. On this last possibility, see Robert C. Post and Nancy L. Rosenblum, *Introduction* to CIVIL SOCIETY AND GOVERNMENT 1 (Robert C. Post and Nancy L. Rosenblum eds., 2002).

[101] This chapter presents, in a more condensed form, the material developed at length in Glendon's piece, *Knowledge Makes a Noisy Entrance: The Struggle for Self-Appropriation in Law*. *See* Glendon, *supra* note 6.

[102] These ideas are developed at length in GLENDON, A NATION UNDER LAWYERS (1996).

> to be a virtuoso of practical reason, weaving back and forth between facts and law, striving not only for a fair disposition of the dispute at hand, but to decide each case with reference to a principle that transcends the facts of that case, all with a view toward maintaining continuity with past decisions, deciding like cases alike, and providing guidance for parties similarly situated in the future. . . .
>
> To be a traditionalist in such a tradition seems pretty clearly not to be frozen in the past or mired in the status quo, but rather to participate, as MacIntyre puts it, in a community of intense discourse about what it is that gives the tradition in question its point and purpose.[103]

In any event, however, by all accounts that method has been close to eclipsed. Glendon tells the sad story of how the varied "legal realist" followers of Oliver Wendell Holmes, Jr., came to substitute the disciplined creativity of the common law method for law as politics.[104] There was even a phase in which it was fashionable to say—in the *Yale Law Journal*, no less—that "trashing" our legal tradition "is fun. I love trashing."[105]

Trashing still goes on, of course, but by and large we are today living an over-compensation for the earlier spectacle and specter of legal realism, including derivatives such as "trashing." We owe this over-compensation to many, but above all to Justice Antonin Scalia. No American of our generation has had more influence on how we *do* law than Justice Scalia has. On the one hand, Justice Scalia has allowed that the common law "has proven to be a good method of developing the law in many fields—and perhaps the very best method."[106] On the other and operative hand, however, Justice Scalia has told us that judges, or at least federal judges, must approach statutes and the Constitution with the very different method that we now refer to as originalist-textualism.[107] Not everyone adheres to that method, but by now it is the starting point of discussion.

As David Tracy has observed, "when literate cultures are in crisis, the crisis is most evident in the question of what they do with their exemplary written texts."[108] Returning to home, the text of our Constitution does not speak a word on how that document ought to be interpreted. While taking cover under the mantle of restraint, Justice Scalia has taken us all on a long march on behalf of textualism and originalism, with the result that, whereas a generation ago the Supreme Court sometimes thought of itself as turning to text only as a second best, texts are now the starting point of judicial analysis. By now, Justice Scalia speaks not just for himself and a few others when he writes: "What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original

[103] GLENDON, *supra* note 1, at 5-6.
[104] *Id.* at 6-13.
[105] Alan D. Freeman, *Truth and Mystification*, 90 YALE L.J. 1229, 1230 (1981).
[106] ANTONIN SCALIA, A MATTER OF INTERPRETATION 12 (1997).
[107] *See* DENNIS J. GOLDFORD, THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM, 20-54 (2005).
[108] *See* TRACY, *supra* note 2, at 11.

draftsmen intended."[109] The practitioner of originalist-textualism, if he is to be believed, resists the lure to do things the common-law way *in order* to give priority to *democracy*, in order, that is, to give effect to the Constitution and the enactments of the democratically elected and accountable legislature. In the name of democracy, he seeks to make the rule of law much as possible the rule of rules.[110]

But is this right? Is this course approvable? Now, there has been no shortage of vigorous and sometimes rigorous discussion of the merits and demerits of the turn to originalist-textualism, and there is no space here to comb the bill of the particulars. However, because many of the law-related chapters of *Traditions* touch on matters to which CSD speaks, a few questions, for further investigation, may be apt. I shall be very brief and necessarily incomplete.

First of all, Justice Scalia's argument for orginalist-textualism proceeds from the putative requirements of democracy. The claim is that the democratically-elected and accountable folks should be making the law (with judges only doing what they're told). But what of the alternative possibility that the people who created and ratified "the Judicial Power" of Article III of the Constitution did themselves (intend to) invest the judges who would wear the Article III mantle with the power to proceed in the common law manner, creative contributors to saying what the law is? If one takes seriously CSD's claim that people have a right to govern themselves, one cannot honestly avoid this question.[111] Whether the people did in fact invest their judiciary with such power would be, of course, a question of history. Glendon quotes H. Jefferson Powell's work on the Framers' *indecision* about how the Constitution should be interpreted.[112]

Second, assuming *arguendo* that that historical record is not decisive one way or the other, would there not be independent reason(s) for *not* concluding that the judicial role is to be no more than that of a conduit for implementing democratically generated texts? The conduit approach owes much to John Austin, and too little to the Catholic view according to which the creation of a legal system is, in part, an attempt to make the natural law effective in human living, not simply to give effect to the will of the sovereign. According to CSD, positive human law is a tool by which societies and individuals seek to reach their natural (and, perhaps, supernatural) potential. This rather exalted role for law assures, without slipping into perfectionism or Utopianism, that the distributions of judicial authority should be calibrated accordingly. Depending on the historical circumstances, a more limited judicial role may in fact be what is required. Mary Ann Glendon suggests as much in Chapter 29 of *Traditions*, in which she offers invited comments on Justice Scalia's Tanner Lecture at Princeton, "Common Law Courts in a Civil Law System: The Role of

[109] SCALIA, *supra* note 106, at 38.

[110] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

[111] *See* PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, *supra* note 27, at ¶ 395; *see also* HITTINGER, *supra* note 46, at 77, 86-87.

[112] *See* GLENDON, *supra* note **Error! Bookmark not defined.**, at 231.

United States Federal Courts in Interpreting the Constitution and Laws," from which I quoted above. Glendon writes, none too understatedly: "Our legal culture also 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."[113] That culture is the one in which judges and even Justices of the Supreme Court depart from the common law method by the imposition of their own will through *inter alia* confecting law according to which there is a "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[114]

Finally, Glendon herself muses: "As for what might emerge if legal theorists were to turn back to law, and to consciously appropriate their own tradition of open-ended, dialectical, probabilistic reasoning, who knows? Creativity is mysterious not only in its origins but also in its outcome."[115] For my part, I think the answer emerges more clearly than anywhere else in the work of Joseph Vining, and above all in his book *From Newton's Sleep*. That book's jacket bears this comment by Glendon herself: "This original book by distinguished Michigan legal scholar Joseph Vining finds surprising treasures hidden in lawyers' ways of knowing. . . . He challenges with equal vigor the widely held notions that law can be reduced to processes and rules, or to power relations, or to meaningless signs and marks." Vining, for his part, suggests that "[i]t is too often overlooked that law is evidence of view and belief far stronger than academic statement or introspection can provide."[116] In his most recent work, Vining has pursued, more clearly than in his early work, the question of whether worthy legal practice requires "religious commitments."[117] Be that as it may, Vining's insights into what we *do* in law, at least when we do it well, are, in my judgment, better guides than all the grand theories that abound.[118]

To draw the threads of these last few paragraphs together, what it means to live under law is much more subtle than much contemporary jurisprudence would indicate. It is a topic for another day that CSD itself sometimes seems to take an unduly lapidary approach to these questions, perhaps having exceeded the bounds of its competence, as when it states that according to "the principle of the 'rule of law' . . . the law is sovereign."[119] As any Thomist knows, law is sovereign only because law is and never is not *in the mind* —first the mind of the law giver, then that of the governed. But recognizing that such law rules is to recognize that minds rule,

[113] *Id.* at 234. For an insightful statement of Glendon's own version of constitutionalism, see Donald Kommers, *The Constitutionalism of Mary Ann Glendon*, 73 NOTRE DAME L. REV. 1333, 1347 (1998).

[114] *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (quoting Justice Kennedy).

[115] GLENDON, *supra* note **Error! Bookmark not defined.**, at 14.

[116] JOSEPH VINING, FROM NEWTON'S SLEEP 5 (1995).

[117] *See* Joseph Vining, *Legal Commitments and Religious Commitments*, 44 SAN DIEGO L. REV. 69 (2007).

[118] My own reliance on Vining has been extensive, above all in Patrick McKinley Brennan, *Realizing the Rule of Law in the Human Subject*, 43 B.C. L. REV. 227 (2002).

[119] PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, *supra* note 27, ¶ 408 (quoting John Paul II in Centesimus Annus).

and to recognize that minds rule is to recognize that ours is a rule of men, not of laws. It is characteristic of modernity to deny that we are ruled by persons.

VIII. *Name it what you please . . .*

It is alternately a help and a hindrance that the chapters of *Traditions* trade on certain concepts of CSD without defining or delving into their meaning. It is a help to the extent that it allows Glendon to come out to meet readers who are not schooled in CSD; there is value to non-technical, commonsensical discussion, as Glendon would be the first to point out. It is a hindrance when the reader is not given enough material to make a judgment or even to be quite sure what is being proposed; non-technical, commonsensical discourse can take one only so far, as Glendon would also agree. Lonergan himself was keenly aware of how common-sense judgments and theoretically-rich judgments can get in one another's way.[120]

The same can be said *mutatis mutandis* about the non-technical introduction and application of the insights of Bernard Lonergan: It is likewise both a help and a hindrance. Doubtless, readers of a four-hundred-and-seventy-one page book generate different analytical expectations from those who hear or read a short piece. All in all, though, *Traditions* is a most welcome gift. The world needs more in the way of no-holds-barred application of Lonergan to law, but it also needs the elegant and conversational introduction and application that Glendon offers.

Among the leading claims Lonergan made, season in and season out, is that most people most of the time think that knowing is like seeing, that is, a simple act. Lonergan countered with the claim that knowing is that structured compound of acts that Glendon refers to over and over: questioning, experiencing, understanding thanks to insight, and judging—judging that conforms to the unrestricted desire to know. Also season in and season out, Lonergan maintained that nothing short of *conversion* is required to grasp the ramifications of knowing's not being a simple matter of using the mind's (nonexistent) eye.[121] One might fairly say that the thrust of Lonergan's work was (and is) to clarify what the person—each of us—must be doing in order to become a knower, that is, to establish how the person must be controlling the various cognitional acts of which he is the only possible master—and to bid the reader to do it for himself. It is a matter, one might say, of gaining self-control. Glendon is perfectly aware that no one is converted by a syllogism—and she is equally aware that *conversion* is what is required. Or so it seems to this reader. If Glendon succeeds in interesting the reader in what Lonergan thinks is necessary in order for any one of us to know the world that is and the world that it would be worthwhile to bring into being, then she will have launched said reader on an onerous but potentially life-changing journey.

[120] *See* FLANAGAN, *supra* note 75, at 69-94.
[121] *See id.* at 262-68.

And, soon enough said reader will have to make a choice on an issue that until now I have elided. At the center of contemporary moral philosophy stands Alasdair MacIntyre's contention that there exist no universal moral norms that precede those generated by a tradition of moral inquiry and against which that tradition's can be judged. Lonergan, by contrast, would agree that there are no tradition-independent moral inquiries, but would point to the mind's own, tradition-independent demands as the norm before which all other putative norms must bow. The time is ripe for a full-dress airing of differences between MacIntyre and Lonergan, traditionalists of two different kinds.[122] Perhaps once Mary Ann Glendon has completed her ambassadorial tour of duty, she will turn her gracious and gifted mind to that work.

Meanwhile,

> 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. 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.[123]

The pure question is, under that other name, "the unrestricted desire to know"—and perhaps the most obvious and poignant result of an encounter with Glendon's work is a reminder that neither Catholics nor others can have good and sufficient reason to restrict our birthright, the opportunity to try to satisfy the unrestricted desire to know. The ongoing tradition of Catholic social doctrine is an impressive if imperfect demonstration of how to go about using intelligence to shape human living. Glendon is bringing it to bear on the most important questions of a world in turmoil. Thank you, Professor Glendon, for caring enough to teach us not to be careless.

In the law school in which I teach, I notice that a course in Catholic social thought is offered, and the crucifixes, or at least most of them, remain on the walls. Neither is assured, of course, but each is an invitation to renew always, our living tradition.

[122] *Cf.* Michael P. Maxwell, Jr., *A Dialectical Encounter Between MacIntyre and Lonergan on the Thomistic Understanding of Rationality*, 33 INT'L PHIL. Q. 385 (1993) (Arguing that Lonergan's position ultimately exposes and resolves contradictions within MacIntyre's position).

[123] LONERGAN, *supra* note 8, at 9.