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## Introduction

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# *Is There a Higher Law? Does it Matter?*

## Introduction

Robert F. Cochran, Jr.\*

When I was a law student at the University of Virginia in the mid-1970s, my jurisprudence professor Calvin Woodard used the law school's architecture to illustrate the twentieth century's major jurisprudential shift. Above the columns at the entrance to Clark Hall, where I spent my first year of law school, carved in stone was the statement: "That those alone may be servants of the law who labor with learning, courage, and devotion to preserve liberty and promote justice."<sup>1</sup>

From the front, we walked into a massive entry hall, adorned on either side with murals. On one side was Moses presenting the Ten Commandments to the Israelites. On the other was what appeared to be a debate in a Greek public square. As we gazed up at the larger-than-life figures, they seemed to represent the higher aspirations of the law. During my second year in law school, we moved to a much more modern, efficient building known then as "no-name hall," some distance from the rest of the University. The statement that had been above the entrance to Clark Hall was placed on a modest plaque at the entrance to the new building. Small pictures of the murals were placed in the lobby. (It is my understanding that a new addition to the law school includes copies of the statement and the mural which split the size difference.)

Mr. Woodard (we always used "Mr." at the University of Virginia) noted wistfully that few contemporary legal philosophers would have thought that the aspirations for law or lawyers conveyed in the motto above

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\* Louis D. Brandeis Professor of Law and Director of the Herbert and Elinor Nootbaar Institute of Law, Religion, and Ethics; J.D., University of Virginia. I would like to thank Pepperdine Law Review's Editor in Chief, Lauren Rico, and the rest of the law review editors for their wonderful work on this volume. They met the challenges of, and hopefully benefitted from, editing the work of scholars from a wide variety of disciplines.

1. Kenneth Elzinga, Professor of Economics at the University of Virginia, and I independently chose to use the Clark Hall inscription in our contributions to this symposium.

the entrance made sense any longer. Such claims were nostalgic remnants of Blackstone's era. Legal philosophy had followed Oliver Wendell Holmes, who defined law as merely "prophesies of what the courts will do in fact"<sup>2</sup> and said, "I hate justice, which means that I know that if a man begins to talk about that, for one reason or another he is shirking thinking in legal terms."<sup>3</sup> Holmes argued that there is no higher law. Law is merely the assertion of power down here. Despite changing views of law, I don't believe that any law school has chosen to place Justice Holmes's "I hate justice" statement above its entryway.

The twentieth century did witness a few memorable higher law assertions, including the Nuremberg Trials and Martin Luther King, Jr.'s "Letter From a Birmingham Jail" (quoting Augustine, "An unjust law is no law at all").<sup>4</sup> But in general, American legal theorists have followed Holmes, with the Critical Legal Studies movement claiming that law is merely power and the Law and Economics movement claiming that good law is merely a matter of efficiency.<sup>5</sup> Both movements advanced very limited views of law. The Critical Legal Studies movement undercut its own prophetic stance and ultimately provided no basis for challenging the power of the powerful. The Law and Economics movement provided no basis for questioning the suffering of those who are inefficient. Neither legal theory provides a basis for arguing that the strong should not exercise power over the weak. Holmes-like skepticism leads ultimately to each person's protection of his own interests. There is nothing to which a prophet can appeal.

But higher law theories have their own problems. A higher law theory can be the basis on which the powerful assert their power. Natural law theory, the most widely shared higher law theory, can rigidify and merely support the status quo.<sup>6</sup> There is a danger that practices that are common at

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2. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

3. ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 89 (2000).

4. AFRICAN INTELLECTUAL HERITAGE: A BOOK OF SOURCES 743 (Molefi Kete Asante & Abu S. Abayomi eds., 1996); see THE CAMBRIDGE COMPANION TO CHRISTIAN ETHICS 92 (Robin Gill ed., 2001) (discussing the "practical force of natural law" seen in the Nuremberg trials and Dr. King's letter).

5. See generally Sanford Levinson, *Strolling Down the Path of the Law (and Toward Critical Legal Studies?)*: *The Jurisprudence of Richard Posner*, 91 COLUM. L. REV. 1221 (1991) (reviewing RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990)); MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1995); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993)). Some twentieth century legal theorists challenged the notion that law is merely power. LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1977) (1969); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (H.L.A. Hart ed., 1980). In addition, as Stephen Smith has noted, in spite of all of the talk of law as merely power and efficiency, lawyers and law professors go on searching for "the law." STEVEN D. SMITH, *LAW'S QUANDARY* 39-65 (2004).

6. See, e.g., Ali Kahn, *The Dignity of Labor*, 32 COLUM. HUM. RTS. L. REV. 289, 338 n.205

a time and place, like slavery and gender roles, will get the unreflective stamp of some natural law proponents. But natural law also provides one of the few bases for challenging the status quo—observe the witness of Martin Luther King. Natural law points to a higher law, one that can correct existing law.

This symposium brings together people from the fields of law, history, economics, theology, and philosophy to address whether there is a higher law, whether it matters, and the numerous other questions that flow from these questions. The ordering of the essays in this symposium is not based on some higher law. It could have been done in many different ways. We divided the essays into historic, modern, theological, and philosophical sections, though almost every speaker made historic, theological, and philosophical claims about the subject.<sup>7</sup> Here is a brief overview of the symposium essays.

Stephen Smith provides a preface to the symposium.<sup>8</sup> Most of the symposium authors read Smith's *Law's Quandary*, a ground-breaking work on the current status of higher law theory, and many authors address his arguments. In the symposium preface, he argues that, though twentieth century legal theory generally rejected the notion that there is a higher law, law practice generally has continued to presuppose its existence. If sixteenth century British lawyer and legal scholar Christopher St. Germain were to return, he would find the work of lawyers to be surprisingly familiar. Smith, in dialogue with St. Germain, explores several questions: Without a higher law, what is the authority of law? Without a higher law, how are we to evaluate whether a law is just? Without a higher law, how are we to determine the *meaning* of a text when the text is unclear? Ordinary lawyers and judges avoid these problems because in the practice of law, they assume the existence of a higher law. Modern law practice, like classic legal theory, assumes that "when we human beings make and interpret and apply law, we

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(2001) (alleging that "natural law has been invoked to entrench the status quo, old traditions, and prejudicial beliefs"); see also JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 4 (Wilfrid Harrison ed., 1967) (describing the "grand and fundamental" defect of Blackstone's *Commentaries* as "the antipathy to reformation").

7. Whether to put Elizabeth Mensch's essay in Part II or Part III was an especially hard call. Her essay compares Critical Legal Studies and Augustinian answers to the problem of indeterminacy and serves as a nice transition between the CLS and theology essays.

8. Steven D. Smith, *Higher Law Questions: A Prelude to the Symposium*, 36 PEPP. L. REV. 463 (2009) [hereinafter Smith, *Higher Law Questions*].

are in a sense joining in a sort of cooperative venture with an intrinsically normative cosmos.”<sup>9</sup>

## I. HISTORIC PROPONENTS AND CRITICS OF THE HIGHER LAW: AQUINAS, BLACKSTONE, AND HOLMES

Part I traces the arguments for and against the notion of a higher law from Aquinas through Holmes. Patrick Brennan introduces us to Thomas Aquinas by giving us Aquinas’s answer to the question whether law is merely, as Holmes argued, “prophecies of what the courts will do in fact.”<sup>10</sup> According to Aquinas, human law is derived from the natural law, which is man’s sharing in the eternal law. Anything else is not real law. Eternal law is “in the divine mind, promulgated from eternity and for the common good of the universe.”<sup>11</sup> Humans participate in—have a share in—the eternal law through the natural law—“a natural inclination to [humans’] proper act and end.”<sup>12</sup> Through the natural law, God leads humans to what is good for them, including life in social relations. Social relations in turn require human law—law made by humans for the common good.

Albert Alschuler shows us how the natural law was reflected in William Blackstone’s *Commentaries*, the legal Bible for eighteenth and nineteenth century English and American lawyers, and traces Holmes’s revolt against natural law.<sup>13</sup> Blackstone taught that “[t]he study of God and the study of human nature led to the same understanding [of natural law]”—“You can discover natural law by reading your Bible . . . [or] by asking whether an action tends to man’s real happiness . . . .”<sup>14</sup> Natural law places some limits on the positive law, but as to most points humans are left at liberty in crafting the positive law.<sup>15</sup> Blackstone recognized that people have a tendency to “mistake for nature what we find established by long and inveterate custom” and argued that the law maker should resist that tendency.<sup>16</sup> Viewed properly, natural law can be a vehicle for reform.

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9. *Id.* at 473.

10. Holmes, *supra* note 2, at 460–61.

11. Patrick McKinley Brennan, *Persons, Participating, and “Higher Law,”* 36 PEPP. L. REV. 475, 482 (2009) (citing SAINT THOMAS AQUINAS, *SUMMA THEOLOGICA*, q. 91, art. 1 (Fathers of the English Dominican Province trans., Benzinger Bros. 1947)).

12. *Id.* (citing AQUINAS, *supra* note 11, at q. 91, art. 2).

13. Albert W. Alschuler, *From Blackstone to Holmes: The Revolt Against Natural Law*, 36 PEPP. L. REV. 491 (2009) [hereinafter Alschuler, *From Blackstone to Holmes*].

14. *Id.* at 493.

15. 1 ST. GEORGE TUCKER, *BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA* 42 (St. George Tucker ed., The Lawbook Exchange, Ltd. 1996) (1803) (internal footnote omitted).

16. Alschuler, *From Blackstone to Holmes*, *supra* note 13, at 494 (quoting WILLIAM BLACKSTONE, 2 *COMMENTARIES* \*11).

According to Alschuler, Holmes and his twentieth century followers generated a legal revolution by removing from the traditional conception of law “the idea that, even as law adapts to changing circumstances, it can adhere at its core to immutable principles of justice.”<sup>17</sup> Without such principles, Holmes identified his “starting point for an ideal for law” as “taking in hand life and trying to build a race,”<sup>18</sup> “restricting propagation by the undesirables and putting to death infants that didn’t pass the examination, etc. etc.”<sup>19</sup> Holmes did not leave such arguments at a theoretical level. In *Buck v. Bell*, he approved of Virginia’s forced sterilization of Carrie Buck, on the grounds that “[t]hree generations of imbeciles are enough.”<sup>20</sup>

## II. LAW AND ECONOMICS, CRITICAL LEGAL STUDIES, AND THE HIGHER LAW

From our look at historic views of higher law, we jump to the Law and Economics and the Critical Legal Studies (CLS) movements of the last quarter of the twentieth century. This section includes scholars identified with both of these opposing wings of legal scholarship.<sup>21</sup> Kenneth Elzinga, one of the foremost Law and Economics and antitrust scholars,<sup>22</sup> challenges Law and Economics’ focus on efficiency at the expense of the higher law’s

17. *Id.* at 497.

18. *Id.* at 502 (quoting Oliver Wendell Holmes, Jr., *Ideals and Doubts*, 10 U. ILL. L. REV. 1, 4 (1915), reprinted in 3 THE COLLECTED WORKS OF JUSTICE HOLMES: COMPLETE PUBLIC WRITINGS AND SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES 443 (Sheldon M. Novick ed., 1995)).

19. Letter from Oliver Wendell Holmes, Jr. to Felix Frankfurter (Sept. 3, 1921), in HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912–1934 125 (Robert M. Mennel & Christine L. Compston eds., 1996).

20. 274 U.S. 200, 207 (1927).

21. As the moderator of this symposium’s panel on which this section is based, I noted an initial tension in the air (a tension that academic conference organizers crave). But at the conclusion of the presentations, the panel (Kenneth Elzinga, Peter Gabel, and Elizabeth Mensch) seemed ready for a chorus of “Kumbaya.” (John Schlegel’s response to Peter Gabel was added after the conference; Elizabeth Mensch’s piece appears at the beginning of Part III).

22. See, e.g., Kenneth G. Elzinga & Thomas F. Hogarty, *Utah Pie and the Consequences of Robinson–Patman*, 21 J.L. & ECON. 427 (1978); Kenneth Elzinga & William Breit, *Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages*, 17 J.L. & ECON. 329 (1974); Kenneth G. Elzinga & William Breit, *Attitudes Toward Risk and Antitrust Penalties*, 85 HARV. L. REV. 693 (1973); Kenneth G. Elzinga, *Predatory Pricing: The Case of the Gunpowder Trust*, 13 J.L. & ECON. 223 (1970); Kenneth G. Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J.L. & ECON. 43 (1969) (cited by Justice Stewart in *Ford Motor Co. v. United States*, 405 U.S. 562, 582 (1972)).

concern for justice and mercy.<sup>23</sup> He notes that Law and Economics scholar and judge Richard Posner argues that rape, murder, and theft should be punished, not because they violate some moral law, but because they are inefficient. Elzinga's challenge comes from Christian and Jewish scripture ("140 entries for justice; zero for efficiency").<sup>24</sup> He quotes the prophet Micah: "[The Lord requires you] to act justly and to love mercy and to walk humbly with your God."<sup>25</sup> Micah does not add, 'Oh, and strive for Pareto-optimality in the process.'<sup>26</sup>

Peter Gabel was one of the founders of the Critical Legal Studies movement and retains close ties to it.<sup>27</sup> Nevertheless, in his essay, he takes on one of the hallmarks of CLS, the argument that law is indeterminate.<sup>28</sup> "[T]he proponents of the indeterminacy critique managed to make themselves unable to offer any 'basis' for their own passionately held moral starting point, declaring that these motivating convictions were 'irrational' and outside the realm of rational knowledge . . ."<sup>29</sup> While Gabel acknowledges that an appeal to "moral longing has been the basis for terrible injustice and suffering," he calls for CLS to "return to its original instincts as a righteous social transformation movement" rooted in love for other human beings and for "a new legal culture that would strengthen and help to realize the loving bond between us; the bond that actually unites us as social beings."<sup>30</sup>

Though Gabel's fellow CLS founder John Schlegel was not at our original conference, he found Gabel's symposium essay sufficiently stimulating that he provided a response.<sup>31</sup> Schlegel acknowledges that some have left CLS because of its failure to identify a firm ground for its critique. Some broke off—"the fem-crits and the race-crits"—grounding their critique in the reality of personal experience.<sup>32</sup> Schlegel identifies several who are attempting to resuscitate CLS, of whom he finds Gabel's attempt to find "rootedness . . . in unalienated social relations" the most interesting.<sup>33</sup> However, Schlegel is skeptical that law can do much to encourage our unity

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23. See Kenneth G. Elzinga, *Law and Economics: Is there a Higher Law?*, 36 PEPP. L. REV. 507 (2009) [hereinafter Elzinga, *Law and Economics*].

24. *Id.* at 509.

25. *Micah* 6:8 (New International Version).

26. Elzinga, *Law and Economics*, *supra* note 23 at 510.

27. My initial emails to Gabel and CLS co-founder Duncan Kennedy inviting them to participate in this symposium were answered by both Gabel and Kennedy from Kennedy's home where they had gathered for a reunion (Gabel accepted my invitation, Kennedy declined).

28. See Peter Gabel, *Critical Legal Studies as a Spiritual Practice*, 36 PEPP. L. REV. 515 (2009).

29. *Id.* at 521.

30. *Id.* at 529.

31. See John Henry Schlegel, *For Peter, With Love*, 36 PEPP. L. REV. 535 (2009).

32. *Id.* at 537.

33. See *id.* at 539.

as social beings. He suggests that humans and law can get along pretty well without any grounding and notes that an Augustinian Christian would recognize that this might be “all that humans have available to them after The Fall.”<sup>34</sup> Schlegel argues: “The patient, necessarily self-critical humility of arguments made from such a position has a certain attractiveness to me, situated as I am today among the wildly overblown claims of warring political factions acting as if saying things over and over, ever louder, makes them more likely to be true.”<sup>35</sup>

### III. THEOLOGY AND THE HIGHER LAW

Our third section explores theological critiques of the higher law. The essay by Patrick Brennan at the beginning of Part One of this symposium presented the higher law framework of Thomas Aquinas which has been followed by the Catholic Church. As the first three essays in this section indicate, other theologians have been more ambivalent about human law reflecting a higher law.

Elizabeth Mensch explores Augustine’s ambivalence about human law.<sup>36</sup> “While many did strive to find continuity between human law and the law of God during [the classical period of the high middle ages], a long and vibrant Christian tradition [represented by Augustine] instead stresses rupture and discontinuity.”<sup>37</sup> Augustine affirmed “the tragic necessity of legal coercion” though the most that we can generally hope for from it is peace.<sup>38</sup> He located messianic justice in the City of God, not in the City of Man. As both Augustine and the Critical Legal Studies movement have argued, law is “much more contingent, more provisional, more self-contradictory, and much more human than it ha[s] been made out to be.”<sup>39</sup>

Ellen Pryor<sup>40</sup> considers Catholic and Lutheran views of law in the context of a story of her early law practice. As she shows, Catholic and

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34. *Id.* For further discussion of both CLS and Augustine, see Elizabeth Mensch’s essay at the beginning of the next section. See *infra* notes 36–39 and accompanying text.

35. Schlegel, *supra* note 31, at 539.

36. See Elizabeth Mensch, *Cain’s Law*, 36 PEPP. L. REV. 541 (2009).

37. *Id.* at 541.

38. See *id.* at 543.

39. *Id.* at 545.

40. Professor Pryor was not a participant in this Higher Law Symposium. A few months after that conference, however, she gave the lecture on which her essay herein is based, the Pepperdine University School of Law Herb and Elinor Nootbaar Institute on Law, Religion and Ethics, Louis Brandeis Lecture: “Hungering for Righteousness: What Can a Lawyer Believe About, and Hope From, Law?” (Apr. 11, 2008).



Thomist natural law theory is likely to create high expectations for law from those who enter the legal profession, expectations that human law will follow reason and the Eternal law of God.<sup>41</sup> Aquinas taught that “the proper effect of law is to make those to whom it is given, good.”<sup>42</sup> Is law worthy of those expectations? How should a young lawyer react if those expectations are crushed? Pryor contrasts the optimistic Catholic natural law view with the more pessimistic Lutheran nature/grace dichotomy: “[The natural law viewpoint] leads me to false optimism about my own ability to discern what the just or right result is.”<sup>43</sup> Pryor leaves us with a call to “an intentional hope that rejects both certainty and despair about what law can do in this world.”<sup>44</sup>

Joan Lockwood O’Donovan, coming from an Anglican perspective, sees an important, yet tragic and limited role for law and political judgment.<sup>45</sup> Human law is God’s “providential condemnation of human wrongdoing which mercifully preserves the common life of sinful human beings against the assault of human evil.”<sup>46</sup> She contrasts law’s limited role with “the promised renewal of created human freedom through the church’s practice of proclamation.”<sup>47</sup> O’Donovan applauds English criminal law, which “has conformed to the longstanding theological conviction that political judgment should not attempt to prescribe, nor aspire to effect, godly, righteous, virtuous, and just conduct, but to proscribe only those graver violations of the moral law that threaten the precarious society of sinful human beings.”<sup>48</sup> A tendency to legal perfectionism encroaches on both “the impaired and fragmentary freedom still available to sinful human beings” and the opportunity for repentance and faith made available through the church’s proclamation.<sup>49</sup> Without a “recognition of the moral deficiencies of political judgment, judges’ practices are bound to succumb to the vices of cynicism, greed, and a lust for power, concealed by a theoretical self-deception that endows the ongoing practice of judgment with more integrity than it actually has.”<sup>50</sup>

In a previous work, William Brewbaker criticized the notion, held by some proponents of a higher law, that judges should “find” law and not

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41. See Ellen S. Pryor, *What Can We Hope from Law?*, 36 PEPP. L. REV. 547 (2009).

42. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, q. 91, art. 1, reprinted in ST. THOMAS AQUINAS, *TREATISE ON LAW*, at 13 (Gateway ed., 8th prtg. 1970).

43. Pryor, *supra* note 41, at 562.

44. *Id.* at 572.

45. See Joan Lockwood O’Donovan, *Law and Redemption: Political Judgment and the Church’s Proclamation*, 36 PEPP. L. REV. 573 (2009).

46. *Id.* at 575.

47. *Id.* at 576.

48. See *id.* at 577.

49. See *id.*

50. *Id.* at 578–79.

“make” it.<sup>51</sup> Brewbaker argued that this notion denigrates the appropriate and godly role of creativity on the part of judges and legislators.<sup>52</sup> Judges, at their best, join with God in developing law.<sup>53</sup> In his essay in this collection, Brewbaker draws insights from Dorothy Sayers’s *The Mind of the Maker* on the role that judges play in making law.<sup>54</sup> As Aquinas argued, we see only the “‘first principles of natural law’—that are naturally known (more or less) to all human beings and are (more or less) the same for all” and judges and legislators must make “particular determinations.”<sup>55</sup> But the creativity of judges and legislators has its limits. When laws ignore “the fundamental realities of human nature, they will end by producing . . . such catastrophes as war, pestilence and famine.”<sup>56</sup> At its best, law will fall short—“the line between good and evil runs through the heart of each human being and, by extension, each political society.”<sup>57</sup>

Many higher law theories are theological in nature. As we have seen, Aquinas argues that the positive law should be based on the natural law and that the natural law is drawn from God’s eternal law. But many natural law proponents, including John Finnis, the leader of the modern revival of natural law, argue that natural law is discernable through reason alone.<sup>58</sup> Yitzchok Adlerstein, in his contribution to this collection, argues that we need divine revelation to discern the higher law.<sup>59</sup> “Absent [religious] faith, our present view of reason as tentative and elastic precludes any workable higher law system of more than academic interest.”<sup>60</sup> Rabbi Adlerstein, quoting Protestant theologian Paul Tillich, suggests that Kant’s non-theological ethics provided the moral wiggle room that led to the Holocaust. Adlerstein argues from the *Talmud*, Maimonides, and Rabbi Yaakov Emden that “there is no wisdom in any humanly arrived-at moral system, because

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51. See William S. Brewbaker III, *Found Law, Made Law and Creation: Reconsidering Blackstone’s Declaratory Theory*, 22 J.L. & RELIGION 255, 278–80 (2007).

52. See *id.*

53. See *id.* at 279–80.

54. William S. Brewbaker III, *Law, Higher Law, and Human Making*, 36 PEPP. L. REV. 581 (2009).

55. *Id.* at 588 (quoting ST. THOMAS AQUINAS, *SUMMA Theologica* pt. I–II, q. 94, art. 4) (Benzinger Bros. eds., *Fathers of the English Dominican Province* trans., 1947).

56. *Id.* at 591 (quoting DOROTHY SAYERS, *THE MIND OF THE MAKER*, at 23 (1956)).

57. *Id.* at 601.

58. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

59. Yitzchok Adlerstein, *Theology and Higher Law*, 36 PEPP. L. REV. 603 (2009).

60. *Id.* at 606.

there is some counter argument for every moral argument that can ever be made!”<sup>61</sup>

#### IV. PHILOSOPHY AND THE HIGHER LAW

Connie Rosati does what philosophers often do. They force us to clarify our questions and answers. She notes the ambiguities in our symposium’s title: “Is There a Higher Law? Does it Matter?”<sup>62</sup> The title raises three separate questions. First, is moral realism true, i.e., are there moral *facts* that are accessible to us? As a sub-question to this, she addresses whether moral truths necessarily have their source in God, a question related to the question Rabbi Adlerstein addresses in the prior essay. Rosati argues, contra Adlerstein, that it is “a mistake to think that the existence of moral truths, and so the existence of a higher law, has any crucial connection with God.”<sup>63</sup> Second, assuming there is a moral reality, is it a necessary condition on a law that it comport with that reality? If so, “[t]he efforts of judges to follow the law in deciding cases will require that they attend not only to precedent and legislatively enacted rules but also to the requirements of morality.”<sup>64</sup> Finally, are there “legal facts that are in some measure independent of the decisions of judges”? The “higher law” might merely be “whatever the law truly requires, forbids, or permits” whether judges get it right or not. Rosati notes that the notion of the rule of law presumes the objectivity of law. “If the law was just whatever judges decided, then judges themselves would not—indeed, could not—be following the law in reaching their decisions . . . .”<sup>65</sup>

Bradley Lewis picks up where Rosati leaves off, with consideration of the rule of law. Lewis explores Plato’s answer to the question whether the rule of law (an “open, clear, coherent, prospective, and stable” set of rules<sup>66</sup>) is consistent with the rule of reason grounded in virtue ethics. Whereas under the rule of reason, wise, virtuous judges would provide an individual assessment of one’s actions in each circumstance, the rule of law requires that law be established beforehand and applicable consistently to all. “For the classics, the ideal is the rule of reason or intelligence, and the rule of law is a kind of necessary compromise of that.”<sup>67</sup> On the other hand, law’s rigidity and universality “allow people to form stable plans and

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61. *See id.* at 608.

62. Connie S. Rosati, *Is There a “Higher Law?” Does It Matter?*, 36 PEPP. L. REV. 615 (2009).

63. *See id.* at 619.

64. *See id.* at 625.

65. *Id.* at 628.

66. V. Bradley Lewis, *Higher Law and the Rule of Law: The Platonic Origin of an Ideal*, 36 PEPP. L. REV. 631, 631 (2009).

67. Lewis, *supra* note 66, at 633.

expectations.”<sup>68</sup> This exposes “a tension rooted in human nature between man’s rational and political capacities.”<sup>69</sup> Lewis, with Plato, explores various ways to manage the tension. Echoing a point developed in William Brewbaker’s essay herein, Lewis argues that “law is a product of human art.”<sup>70</sup> Lewis concludes by tracing this issue from Plato through Aristotle to Aquinas, noting that Aquinas roots the rule of law in the higher law, arguing that “laws are the necessary basis but that individuals can be dispensed from them in cases where the common good would be better served.”<sup>71</sup>

Dallas Willard,<sup>72</sup> in the final symposium essay, notes that the existence of an appeals system acknowledges that law (at least as determined by trial judges) stands under judgment. “But there are distortions [in individual cases] that no appeals system can correct. Sometimes what comes out of due process is simply wrong and unjust.”<sup>73</sup> A higher law is needed, both to assess the outcome of legal processes in individual cases and to assess the possible need for changes in the law through legislation. “To say there is no higher law really means that there can be no issue as to what is *morally* right with regard to the conduct and outcome of legal procedures. That surely undermines the confidence in law that is essential to its use and essential to the health and stability of a society and human existence based upon law.”<sup>74</sup>

At the end of the day, many questions are left on the table. The most challenging may be, if there is a higher law and it is to serve as a guide for the positive law, how do we find it and what are its contents? Those are questions for many more conferences and symposia.

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68. *See id.* at 638.

69. *See id.* at 638–39.

70. *See id.* at 637.

71. *See id.* at 660 (citing ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* IaIIae at q. 96, art. 6; *cf. id.* at q. 97, art. 7).

72. Dallas Willard, *Why It Matters Whether There Is a Higher Law or Not*, 36 PEPP. L. REV. 661 (2009).

73. *Id.* at 663.

74. *Id.* at 664.

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