

4-20-2009

## Persons, Participating, and "Higher Law"

Patrick McKinley Brennan

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Jurisprudence Commons](#)

---

### Recommended Citation

Patrick McKinley Brennan *Persons, Participating, and "Higher Law"*, 36 Pepp. L. Rev. Iss. 5 (2009)  
Available at: <https://digitalcommons.pepperdine.edu/plr/vol36/iss5/3>

This Symposium is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact [bailey.berry@pepperdine.edu](mailto:bailey.berry@pepperdine.edu).

# Persons, Participating, and “Higher Law”

Patrick McKinley Brennan\*

## I.

Nearly a decade ago Steven Smith published something short called *Legal Theories Nobody Believes*.<sup>1</sup> It is a searching, sobering assessment of the well-known work of two influential contemporary legal scholars.<sup>2</sup> Like Smith, I do not recommend the two books.<sup>3</sup> I mention the review because its memorable title telegraphs the main point Smith develops at length in his more recent and splendid book, *Law’s Quandary*.<sup>4</sup> Smith’s thesis is that nobody or almost nobody believes what gets said in justification of what we do in the name of the law but meanwhile we go on practicing said law—and

---

\* B.A., Yale College (philosophy), M.A., University of Toronto (philosophy), J.D., Berkeley Law, law clerk to the Hon. John T. Noonan, Jr., United States Court of Appeals for the Ninth Circuit. This paper was prepared for presentation at the conference “Is There a Higher Law? And Does It Matter?” at Pepperdine University on February 21–22, 2008, and it remains here, apart from a few minor changes and the addition of footnotes, just as it was presented in Malibu. I am grateful to Robert Cochran for the invitation to participate in the conference and to Lindsay Bish for her fine research assistance. I have benefited from countless conversations about these topics with Michael Moreland.

1. Steven D. Smith, *Legal Theories Nobody Believes*, FIRST THINGS: A MONTHLY JOURNAL OF RELIGION & PUB. LIFE, Nov. 2000, at 32 [hereinafter Smith, *Legal Theories*].

2. *Id.* at 32.

3. *Id.* at 34, 36–37. Smith rejects Frank I. Michelman’s conclusion in *Brennan and Democracy*, as noncommittal, as it states: “Here’s something that *you*—you nonspecialists—might find persuasive. *Justice Brennan* might even have believed it. As for *me*, well, I might and I might not.” *Id.* at 34. Smith then discusses Tinsley Yarbrough’s *The Rehnquist Court and the Constitution*, and is unimpressed by its academic credibility, stating “[v]ery occasionally Yarbrough attempts to supplement his summarizing with what might be classified as analysis, but he avoids taxing the readers’ patience with these efforts.” *Id.* at 36–37.

4. STEVEN D. SMITH, *LAW’S QUANDARY* (Harvard Univ. Press 2004) [hereinafter SMITH, *LAW’S QUANDARY*]. Smith’s book has been the subject of two law review symposia. The first grew out of a conference at the Columbus School of Law and included papers by Smith himself, William Wagner, Justice Antonin Scalia, Joseph Vining, Lloyd Weinreb, and Patrick McKinley Brennan. See 55 CATH. U. L. REV. (2006). The second, which grew out of a conference at the Notre Dame Law School, appeared in the *San Diego Law Review* and included papers by Smith himself, Joseph Vining, Brian Bix, Lawrence Solum, and Patrick McKinley Brennan. See 44 SAN DIEGO L. REV. (2007).

even charging clients more for our professional services. As Smith sees it, law's quandary is that we are in collective bad faith about what we do in law. The practice of law goes along pretty much as it always has since the middle ages, but the *cognoscenti* no longer believe—indeed they disbelieve and regularly deny—law's traditional theoretical supports.<sup>5</sup>

The trouble is not that we have given up *doing* law. Statutes, legislative rules, interpretative rules, administrative decisions, judicial decisions, and such are being produced in record numbers across the United States today. The statutory codes swell, the case reporters go into new series, and the Government Printing Office can barely keep up with our zeal to regulate from soup to intrauterine devices. Lawyers are called to the bar, judges are translated from one bench to another, and the Great Writ of habeas corpus occasionally issues. We are awash in the badges and incidents of law. As Oliver O'Donovan has observed, today “[a]n incessant stream of lawmaking [would seem to be] the fundamental proof of political viability.”<sup>6</sup> Appearances, the appearances of lawfulness, are kept up.

Meanwhile, however, there is a spreading suspicion that the legal materials are being pumped out like a mint prints money after abandoning the gold standard. There are more of them, to be sure; but what in the world are they worth? What do the legal materials stand for? What stands behind them? *Who* stands behind them? Law's quandary is that we can cite and practice law, but meanwhile the *cognoscenti* remark that the emperor's wardrobe isn't what it used to be. Appearances are getting a little thin.

The widening worry is that law may turn out to be just what Justice Oliver Wendell Holmes, Jr., adopting the outlook of “the bad man,” declared in 1897: “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”<sup>7</sup> *What* stands behind the superabundance of legal materials? Many suspect that the answer may not be a *what* (law) but a *who*: Men and women who are unconstrained by law.

The view expressed in the preceding sentence is that of “legal realism,” the view that, thanks to the industry of Holmes and his legion disciples, came to dominate much of twentieth century jurisprudence.<sup>8</sup> “Realism” in law is virtually the opposite of what it is in epistemology or metaphysics. In law, realism is about the absence or the withdrawal of law that is *there to be known*. It is the position according to which the possibility of living *under law* is a fairy tale, the tissue of noble (or ignoble) lies and fictions with

---

5. See SMITH, LAW'S QUANDARY, *supra* note 4, at 164, 179.

6. Oliver O'Donovan, *Government as Judgment*, in BONDS OF IMPERFECTION: CHRISTIAN POLITICS, PAST AND PRESENT 207, 213 (2004).

7. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 460–61 (1897).

8. For a crisp and compendious survey of the trend and topics of twentieth century Anglo-American jurisprudence, see Robert P. George, *What Is Law? A Century of Arguments*, FIRST THINGS: A MONTHLY JOURNAL OF RELIGION & PUB. LIFE, Apr. 2001, at 23–29.

which officials armed with the coercive power of the state wallpaper over their (virtually) unfettered discretion. Justice Antonin Scalia reveals himself to be a realist—of a peculiar sort, to be sure—in the following confession: “That is why, by the way, I never thought Oliver Wendell Holmes and the legal realists did us a favor by pointing out that all these legal fictions were fictions: Those judges wise enough to be trusted with the secret already knew it.”<sup>9</sup> There will be more to say at the end about Justice Scalia’s Plan B, which, as everyone knows, is to insist that texts *are* law and persons are the problem to be overcome.<sup>10</sup>

The important *general* question is this: With the toothpaste already out of the tube and legal theory all around that does not support how we actually practice law, what are we to do?

Well, Holmes died, Justice Scalia *et al.* could resign, and, as Justice Clarence Thomas has recently volunteered in an interview that included the topic of his level of job (dis)satisfaction, he has his “motor coach” to look forward to.<sup>11</sup> But what about the rest of us? After all, we need a workable legal system in order to exchange goods, receive compensation for tortious injuries, incarcerate criminals, regulate the content of peanut butter, and, of course, to ensure the freedoms both to burn the flag and “to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life,”<sup>12</sup> do we not? And, *surely*, it would be better not to think of what we do in the name of the law as mere fiction and fairy tale. What can take away your loved one’s, your enemy’s, or your own life or liberty is—there is no mistaking it—an inherently serious business. We may laugh about regulating through law the percentage of peanuts that is required before a product can be labeled “peanut butter,” but Justice Kennedy probably was not laughing when he concluded that it is on account of “liberty . . . in its more transcendent dimensions” that there is (now) a *right in law* to engage in homosexual sex.<sup>13</sup> But did the Justice remember that

9. Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE. W. RES. L. REV. 581, 589 (1989–1990).

10. See Patrick McKinley Brennan, *Realizing the Rule of Law in the Human Subject*, 43 B.C. L. REV. 277 (2002); Patrick McKinley Brennan, *Locating Authority in Law, and Avoiding the Authoritarianism of “Textualism,”* 83 NOTRE DAME L. REV. 761, 766, 788 (2008).

11. See *Rush Interviews Justice Clarence Thomas*, (Oct. 1, 2007) [www.rushlimbaugh.com/home/daily/site\\_100107/content/01125106.guest.html](http://www.rushlimbaugh.com/home/daily/site_100107/content/01125106.guest.html).

12. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (abortion); see also *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning).

13. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

one of the legal realists' favorite epithets for the jurisprudence they rejected is "transcendental nonsense?"<sup>14</sup>

## II.

Legal realism in its pure and unadulterated form burned like wildfire in the academy until, half way through the last century, the fires of the Nazi gas chambers made necessary the trials at Nuremberg. Many of those who were realists before the legally-sanctioned charring of millions were chastened and hastened to look again for reason to conclude that whatever judges (and other state officials) "do in fact" is not *ipso facto* law to be obeyed. Mercifully, World War II and its aftermath prompted a recrudescence of intellectual interest in the possibility that the effects of "positive law" must be limited by the requirements of justice. And this line of inquiry in turn led people to inquire again of "higher law," including of natural law and natural rights. Jacques Maritain catches the spirit of this recovery of sense as follows:

[W]hen it comes to the application of basic requirements of justice in cases where positive law's provisions are lacking to a certain extent, a recourse to the principles of Natural Law is unavoidable, thus creating a precedent and new judicial rules. That is what happened, in a remarkable manner, with the epoch-making Nazi war crimes trial in Nuremberg.<sup>15</sup>

Holmes had been characteristically dogmatic in his dismissal of natural law (and natural right): "The jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere."<sup>16</sup> But that was back in 1918. From Auschwitz, then Nuremberg, and then the 1948 Universal Declaration of Human Rights right up to the present, "higher law" has again been on the table, or at least on most people's. While Alasdair MacIntyre, for example, does affirm the existence of the natural law, he also is of the opinion that belief in natural rights is of a piece with belief "in witches and in unicorns."<sup>17</sup> Surely Ralph McInerny is right that "[t]he pleasure the Catholic might find in mocking growing lists of human rights is dimmed when he finds the Magisterium

---

14. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

15. JACQUES MARITAIN, *MAN AND THE STATE* 95 n.12 (1951).

16. Oliver Wendell Holmes, *Natural Law*, in *COLLECTED LEGAL PAPERS* 310, 312 (1920).

17. ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 69 (3d ed. 2007).

addressing him with this same language,"<sup>18</sup> but still that does not settle the question of who is right and who is wrong. Some, such as Alan Gewirth, affirm natural rights but not natural law.<sup>19</sup> And Pope Benedict XVI himself, without by any means denying the existence of the natural law, has observed that today, for many, "[the] last surviving element [of the doctrine of natural law] is *human rights*."<sup>20</sup> The natural law, as an instrument of discourse about how to order our conduct and affairs, "has become blunt."<sup>21</sup>

What are we to do? In an effort to address what Smith diagnosed as law's quandary, some have suggested that perhaps what we need to do is to "re-mystify" the law.<sup>22</sup> We need, in other words, to look at law the way people did before the realists washed us with their "cynical acid."<sup>23</sup> Perhaps this is not a hopeless enterprise. I am told that, under the right circumstances, toothpaste can be reintroduced into the tube, and even after the depredations of the sacred liturgy that Catholics and others have become familiar with over the last forty years, there remains the possibility that Pope Benedict XVI's commendable recent efforts concerning the proper celebration of liturgy will result in a "re-mystification" of the Holy Sacrifice of the Mass, at least for some.<sup>24</sup>

But what of the law? What would it even look like to "re-mystify" what Holmes described, quite correctly, as a "well-known profession?"

I would stress that loose talk about "higher law" risks inviting the Holmesian dismissal of the "brooding omnipresence in the sky."<sup>25</sup> Just as one man's *modus ponens* is another's *modus tollens*, one man's re-mystification is another's obscurantism—and obscurantism is out of place in inherently serious enterprises. In inquiring about the place of "higher law" in potentially resolving law's quandary, I shall put a premium on what can

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

19. See, e.g., ALAN GEWIRTH, *HUMAN RIGHTS: ESSAYS ON JUSTIFICATION AND APPLICATIONS* 1-78 (Univ. of Chicago 1982).

20. JOSEPH CARDINAL RATZINGER (Pope Benedict XVI), *VALUES IN A TIME OF UPHEAVAL* 39 (Brian McNeil trans., 2006).

21. *Id.* at 38.

22. See, e.g., Gordon S. Wood, in ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 63 (1997).

23. See Holmes, *supra* note 7, at 462.

24. These efforts are evident in the Pope's own celebrations of the Mass, his many and frequent teachings on liturgy, and in the *motu proprio* allowing broader use of the Missal of Blessed Pope John XXIII (commonly known as the Tridentine Mass). See Letter of His Holiness Benedict XVI to the Bishops on the Occasion of the Publication of the Apostolic Letter "Motu Proprio data" *Summorum Pontificum* on the Use of the Roman Liturgy Prior to the Reform of 1970 (July 7, 2007), available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/letters/2007/documents/hf\\_benxvi\\_let\\_20070707\\_lettera-vescovi\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/letters/2007/documents/hf_benxvi_let_20070707_lettera-vescovi_en.html).

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

be said that seems reasonable, not mysterious—understanding all the while that, first, what is reasonable does not compel the mind’s assent and, second, what is reasonable exceeds what narrow rationalism and scientism postulate. The position I shall sketch is definitely theological, but rigorous theology is not a grasp in the direction of “re-mystification.”

A first step in the direction of clarity might be to observe that the phrase “higher law” is not accompanied by a philosopher’s or a theologian’s definition of the same. Its meaning is obscure and varied. Popularized by Edward Corwin in his 1928–1929 essay “The ‘Higher Law’ Background of American Constitutional Law,”<sup>26</sup> both before Corwin and after, it has been used to refer to a whole range of phenomena. At one end, there is the “law regularly administered in the ordinary courts in the settlement of controversies between private individuals”;<sup>27</sup> at the other, there is “natural law” as understood in the tradition of Thomistic thought.<sup>28</sup>

Corwin observed of higher law in his sense that “the problem is not how the common law became *law*, but how it became *higher*, without at the same time ceasing to be enforceable through the ordinary courts even within the field of its more exalted jurisdiction.”<sup>29</sup> I dare say Corwin was right to wonder about this. Over the many centuries, some densely spooky stuff has been said about the nature and origins of the common law. Judges as “oracles” of the same is just one example.<sup>30</sup> Christopher Columbus Landgell’s common law doctrines that operate like self-moving marionettes are another.<sup>31</sup> The realists were right to repudiate the cultured obscurity.

But what if we ask the same question *mutatis mutandis* about the natural law as understood in the Thomistic tradition? What, according to Thomas Aquinas, is the relationship between human law and the natural law? If we are less dismissive than Holmes but still not willing to “re-mystify,” how will the natural law fare? Does it suffer from a cognate confusion? At least one current member of the Supreme Court has been insistent that the “natural law” has a role to play in the interpretation of the U.S. Constitution, and although it would be a mistake to jump to the conclusion that Justice Thomas has the doctrine of Aquinas in mind, the Justice’s pro-natural law

---

26. EDWARD S. CORWIN, *THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (Amagi ed., LibertyFund, Inc. 2008) (1928–1929).

27. *Id.* at 22.

28. See Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL’Y 63 (1989).

29. CORWIN, *supra* note 26, at 23.

30. See, e.g., JOHN DAWSON, *THE ORACLES OF THE LAW* (1968).

31. See Patrick McKinley Brennan, *Realizing the Rule of Law in the Human Subject*, 43 B.C. L. REV. 227, 243–45 (2002).

stance stands as a reminder that higher law remains, at least potentially, on the table for discussion in the conference room of the Supreme Court.<sup>32</sup>

### III.

Theorizing about what over time would come to be called "natural law" began before the fifth century B.C., and by the thirteenth century "[t]he complexity of the tradition, the variety of the strands to be woven together . . . demanded a synthesis of genius. One such was found in St. Thomas Aquinas."<sup>33</sup> Though there were others, and those others have their subsequent and important histories, it is the Thomist synthesis that has had the biggest influence and today, thanks in part to its embrace by the modern popes (until Benedict XVI), most recommends itself for our consideration. Even within the Thomistic tent, of course, there exist camps and lines of division, including on the definition or status of the natural law. But, appropriately enough for a discussion of "higher law," the line I shall pursue takes seriously that (as one scholar has put it) "St. Thomas . . . regards the natural law as genuinely satisfying the definition of law . . ."<sup>34</sup>

This might seem innocuous enough (after all, why *wouldn't* "natural law" fit the definition of "law"?), so let me be sure to make the dog not only bark but also bite. When in the *Summa Theologiae* St. Thomas comes to consider the two extrinsic principles by which God helps humans become good, grace and law,<sup>35</sup> he defines law as "nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated,"<sup>36</sup> and from there he goes on to consider the various "kinds" of law. Though he identifies four kinds of law, one of which is the "natural law," we cannot rule out a priori that St. Thomas is mistaken in concluding that natural law in fact meets his definition of law. What Thomas or others refer to as "natural law" could turn out not to satisfy

32. For a discussion of what Justice Thomas might mean by "natural law," see SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* 36–68 (1999).

33. MICHAEL BERTRAM CROWE, *THE CHANGING PROFILE OF THE NATURAL LAW* 136 (1977).

34. CROWE, *supra* note 33, at 166. See also Steven L. Brock, *The Legal Character of Natural Law According to Thomas Aquinas* (1988) (unpublished Ph.D. dissertation, University of Toronto) available at [http://www.pusc.it/fil/p\\_brock/naturallawthesis.pdf](http://www.pusc.it/fil/p_brock/naturallawthesis.pdf).

35. SAINT THOMAS AQUINAS, *SUMMA THEOLOGIAE*, Prologue to I-II q. 90 (Edizioni San Paolo 1988) ("Consequenter considerandum est de principiis exterioribus actuum. Principium autem exterius ad malum inclinans est diabolus . . . Principium autem exterius movens ad bonum est Deus, qui et nos instruit per legem, et iuvat per gratiam.")

36. SAINT THOMAS AQUINAS, *SUMMA THEOLOGICA* q. 90, art. 4 c (Fathers of the English Dominican Province trans., Benzinger Bros. 1947).



Thomas's definition of law, and thus to be "law" only through analogy or metaphor. Many scholars indeed think that natural law is not quite law in the full sense of Thomas's definition. For these, "law" as it appears in "higher law" would need to be in scare-quotes.<sup>37</sup> But Thomas, whose definition it is, thinks otherwise, and with good reason.

For St. Thomas, and I dare say for all Christians, it is bedrock that the whole of creation is governed, even now, by God, and Thomas adopts St. Augustine's judgment according to which such government is properly understood as being through *law*: "That Law which is the Supreme Reason cannot be understood to be otherwise than unchangeable and eternal."<sup>38</sup> The idea of government in the divine mind, promulgated from eternity and for the common good of the universe, Thomas refers to as the "eternal law."<sup>39</sup> It is the exemplary instance of what Thomas has defined as law. If there is more than one "higher law," this would be the highest. The eternal law is as high as it gets.

From his consideration of the eternal law, Thomas turns next to ask whether there is in man a "natural law." By the time Thomas wrote, this was a common enough question—a fact virtually assured by St. Paul's teaching that the pagans who did not have the Torah possessed the law in virtue of the fact that it was engraved on their hearts,<sup>40</sup> a law the glossators had found fit to describe as "natural law."<sup>41</sup> Thomas answers in the affirmative, of course, but he does so in a way that *is* the dog's bite:

Now among all others, the rational creature [man] is subject to Divine providence in the most excellent way, in so far as it partakes of a share of providence, by being provident both for itself and for others. Wherefore it has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end: and this participation of the eternal law in the rational creature is called the natural law . . . . [T]he natural law is nothing else than the rational creature's participation of the eternal law.<sup>42</sup>

Responding to an objection stating that the eternal law is sufficient, and therefore a natural law would be (*per impossible*) a superfluity in creation, Aquinas explains: "This argument would hold, if the natural law were

---

37. Among the names of prominent scholars who do not regard the natural law as satisfying Thomas definition of law in a univocal way, one can mention Dom Odon Lottin, Mortimer Adler, and John Finnis.

38. AQUINAS, *supra* note 36, at q. 91, art. 1.

39. *Id.* at q. 91 c.

40. *See Romans* 2:14.

41. *See CROWE, supra* note 33, at 77–78.

42. AQUINAS, *supra* note 36, at q. 91, art. 2 c.

something different from the eternal law: whereas it is nothing but a participation thereof . . . ."<sup>43</sup>

The doctrine is technical, of course, and I have prescinded from many of the technicalities in order to put in as bold relief as possible the following Thomistic thesis: the rational creature is a participant in—he has a share in—the eternal law, the divine mind. The human person, the rational creature, is not himself or herself a law; law is not a proper predicate of human nature. Nor is divinity a proper predicate of the rational creature. However, God has "instilled (*inseruit*) [the natural law] into man's mind so as to be known by him naturally."<sup>44</sup> Through the extrinsic principles of the natural law, God governs us interiorly. The principles are extrinsic (because they are not part of human nature), but they are interior.<sup>45</sup>

When we ask, then, whether we are under a "higher law," the answer is more complex than is commonly heard. The "natural law" is *natural* in virtue of how we receive and hold it in our human minds. It is supernatural, though, in its source and pedigree. The natural law is a divine law, not simply human practical reason, but it is held in human reason and is our sharing in the eternal law. The divine governance is at work within us, though in our freedom we are free to flaunt God's will that we be fulfilled and prefer instead to do what is not good for us. Perhaps gilding the dog's bite, Aquinas observes: "The natural law has the character of law *maxime*."<sup>46</sup>

#### IV.

One of the radical implications of Thomas's doctrine of the natural law is that every rational person can reach a judgment, and then proceed to action, according to a real law.<sup>47</sup> Though some, but only some, people have the opportunity to participate in the eternal law through that more perfect means that is the divine positive law, every single rational person can, and should, be about the business of making the natural law effective in his life by reaching judgments according to its terms. Indeed, working out and implementing the natural law would be one partial—and, admittedly, not

43. *Id.* at q. 91, art. 2 ad 1.

44. *Id.* at q. 91, art. 4 ad 1.

45. On this point and for supporting citations to Aquinas, see RUSSELL HITTINGER, *THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD*, 294 n.58, 301 n.17 (2003).

46. AQUINAS, *supra* note 36, at q. 90, art. 4 ad 1.

47. On the radical consequences of every rational person's being capable of reaching moral judgment according to a real law, see ALASDAIR MACINTYRE, *Natural Law as Subversive: The Case of Aquinas*, in 2 *ETHICS AND POLITICS: SELECTED ESSAYS* 41–63 (2006).

very jazzy—way of describing what each of us should be up to in this life. This is because the natural law, though an extrinsic principle, is ordered toward our reaching our natural ends, those things that are good(s) for us *qua* human.

More specifically, the natural law is the rational creature's share in the divine government by which God leads creatures to their proper end(s), that is, what is in fact *good for them*. The first precept of that law is that "*good is to be done and pursued, and evil is to be avoided,*" and from this all the others flow.<sup>48</sup> "[W]hatever the practical reason naturally apprehends as man's good (or evil) belongs to the precepts of the natural law as something to be done or avoided."<sup>49</sup> As Thomas goes on to explain, all those things to which we are naturally inclined we naturally apprehend as good and, therefore, as to be done and pursued: "Wherefore according to the order of natural inclinations, is the order of the precepts of the natural law."<sup>50</sup> First, then, man is inclined to the good that is common to all animals; that is, to stay alive, to stay safe, to stay fed.<sup>51</sup> Second, man is inclined to what is more characteristic of him but that he shares with other animals; that is, to have sexual intercourse, to educate offspring, and the like.<sup>52</sup> Third, man is inclined to that which is proper to him, and this includes living according to reason.<sup>53</sup>

The preceding is the merest sketch of a complex doctrine, but it is enough to lead us to the starting points of human law. According to Thomas, among the things that are proper to us and commanded by the third-mentioned primary precept of the natural law, is to live with other persons. Man's true good includes *living in society*, and for this reason the natural law commands that people associate.<sup>54</sup> The idea is the familiar but fading one, utterly repudiated by John Locke and his atomizing descendants,<sup>55</sup> that sociality is an intrinsic natural perfection of the human person, not an optional add-on. But equally familiar and not at all faded is the idea, or rather the inescapable fact, that people coming to live together—even very virtuous people, not to mention the rest of us—will need both to order their common life and to provide the basis for authoritative resolution of disputes that arise.<sup>56</sup>

---

48. AQUINAS, *supra* note 36, at q. 94, art. 2 c. et ad 1.

49. *Id.* at q. 94, art. 2 c.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. See JOHN LOCKE: SECOND TREATISE OF GOVERNMENT §§ 123–31 (C.B. Macpherson ed., Hackett Publ'g Co. 1980)

56. AQUINAS, *supra* note 36, at q. 95, art. 1.

Thus enters the need for human law, a system of laws made by men for their common good. Law does not begin with human law; humans can make law because the law that they are already under requires them to do so. It is because they are subject to the natural law that men and women are *both* competent to *and* obligated to proceed to make human law: They must implement the natural law and make it effective in their living. Human laws are nothing else than ordinances of reason for the common good, made by him or them who have care of the community, and promulgated, the component parts of such a system will be derived from the natural law, either by way of conclusions from premises (e.g., the prohibition against murder) or as giving specification or determination to what is left vague by the natural law itself (e.g., the requirements of safety will require authoritative decisions about which side of the street people are to drive on).<sup>57</sup> Human law never exists apart from the eternal law. According to Aquinas, "every human law has just so much of the nature of law, as it is derived from the law of nature,"<sup>58</sup> which, it will be recalled, is just is our participation in the eternal law.

Even though every rational person is competent to and obligated to reach judgments according to the natural law, individuals are not, however, without more, competent to pass laws for the community or to impose judgment (on individuals and groups) in the name of the community. No one has the role of "legislator," "judge," or "executive" from the natural law itself. The community as a whole is about the business of implementing the natural law, but the community will need to decide the specific roles its representatives will take vis-à-vis that work of implementation. According to Thomas, it falls to the community, in the first instance, to create offices for the care of the community.<sup>59</sup> What is in an office depends on what the people put there, and what exactly they put there, the labels do not entirely reveal.

In sum, it falls to the people to decide how to make the natural law effective in their community.<sup>60</sup> Different times and seasons call for different allocations. The people may have been broad or narrow, precise or vague in their parceling out of offices, but the issue remains ever and always the one of determining what office the people in fact conferred. For an individual or

---

57. *Id.* at q. 95, art. 2.

58. *Id.*

59. See HITTINGER, *supra* note 45, at 72–91.

60. *Id.* at 74.

a sub-group to re-shape office(s) is to work a usurpation that harms the common good.<sup>61</sup>

But what of the money question, the question whether a “judge” can speak the natural law directly?<sup>62</sup> This turns out to be a question of what judicial office(s) the people have created. I would underline this point that is so often overlooked. The question of what a given judicial office contains calls for an empirical answer, not a gesture toward a Platonic form of judging. The judicial office is not an *a priori* category. Mortimer Adler, among others, is *wrong* that the moral force of human law requires that judges be able to speak the natural law directly.<sup>63</sup> Also wrong are those who regard a judicial office that can speak the natural law directly as inherently unacceptable.<sup>64</sup>

There is nothing wrong *in principle* with the people’s tasking judges with speaking the natural law directly by, for example, displacing an immoral statute with an alternative judicially-generated and morally acceptable alternative. In a human legal system in which judges are not tasked with speaking the natural law directly, moreover, it is competent, indeed morally necessary, for judges not to proceed to judgment when to do so would violate the natural law.<sup>65</sup> Recusal is always possible, and resignation is the limit case.

But *should* judges be tasked with speaking the natural law directly? And, in any event, *have they been* handed that responsibility, at least in some measure, in our own country?

These are important questions. The answer to the first more or less follows from what has already been said. People whose infeasible responsibility it is to implement the natural law should task their judges with speaking the natural law directly when to do so would, all things considered, alter the probabilities in favor of the natural laws being implemented. Judges, because they are just as human as the rest of us, can mistake the terms and true requirements of the natural law, both willfully and inadvertently. The possibilities of a *Lawrence v. Texas*, which, again, recognized that right to be free to engage in homosexual sex,<sup>66</sup> must be measured against those of a *Pierce v. Society of Sisters*,<sup>67</sup> which recognized the constitutional right of parents, not mentioned in the text of the Constitution, to educate their own children.

---

61. *Id.* at 77.

62. *See id.* at 76.

63. *See id.* at 81–83.

64. *Id.* at 84–89 (criticizing Judge Robert Bork’s expressed rejection of judicial appeals to natural law).

65. *See id.* at 109–10.

66. *See supra* note 14 and accompanying text.

67. 268 U.S. 510 (1925).

To answer the second question would require a thorough marshalling and evaluating of data, work that is not possible here. I shall just hint at what I regard as the right answer by saying that I consider the *Pierce* case to be correctly decided.<sup>68</sup>

## V.

Would it be too much to suggest that, to the extent we are in a quandary in law, it is because we are insufficiently Thomistic in our philosophizing about law? Perhaps the problem that is "law's quandary" is that we measure our legal practice against jurisprudential theories that are, as the legal realists had the courage to say, nonsense. We do well to recall that what the realists were reacting against was not the real Thomas Aquinas, but first, the mists of English mythology about the common law, and second, the decadent theories of natural law and natural rights, with an admixture of Hegelian Geist, that had come to dominate in the post-Reformation period. The house-cleaning was overdue.

But if we are insufficiently Thomistic in our theory, it is not so with our practice, at least not in the main, at least not yet. Tomorrow may be another story, but today the quotidian practice of law breathes the natural law, if imperfectly, even as our theoreticians deny or overlook it. That practice is nowhere better illumed, in my judgment, than in Joseph Vining's *From Newton's Sleep*,<sup>69</sup> one of the best books ever written on law as a human endeavor that involves whole persons. The book cannot be summarized; it must be read, pondered, and—in the real sense of the following verb—perused.

I do not believe that the "natural law" is mentioned by name even once in Vining's book, but of course the foundation of the moral order neither rises nor falls on the use of that freighted phrase. A principal insight of the book is that the ordinary acts that cumulate as that practice we call *law* is guided by something other than—higher than?—the texts and their plain meanings. It is a matter of observation that we do not *necessarily* give public effect to legislative texts. Just to pick one among his thousands of insights and examples, Vining observes that "[l]egislation is the arbitrary which we allow—but also limit. To make the point in its strongest form, it could be said legislation is lawless behavior, except that by a paradoxical

---

68. For some, but not all, of the reasons that I think *Pierce* was correctly decided, see Patrick McKinley Brennan, *Harmonizing Plural Societies: The Case of Lasallians, Families, Schools—and the Poor*, 45 J. CATH. LEGAL STUD. 131, 166–67 (2006).

69. JOSEPH VINING, *FROM NEWTON'S SLEEP* (Princeton Univ. Press 1995).

trick we make legislative statements materials which we use in determining what the law is.”<sup>70</sup>

Is this an attempt to “re-mystify” the law? Emphatically not: it is Vining’s observation about what is *already* present in and implicitly affirmed by what we *do* day after day, season after season. His observation could be mistaken, but it should at least be tested before being discarded. “[I]t is too often overlooked that law is evidence of view and belief far stronger than academic statement or introspection can provide.”<sup>71</sup> Though Vining’s idiom is emphatically not Thomas’s, the legal world as he brings it to light is one of persons engaged in the collective struggle to create and re-create law so as to be obedient to a law not of their own making. We make mistakes, to be sure, but Vining sees us willingly caught up in an activity that is as spiritual as it is practical. “Lawyers,” he observes, “are caught by legislation and their reading of it. Either they must believe what they do with legislation is often foolish and deceptive; or they do believe and confess a belief in an informing spirit in the legislated words that is beyond individual legislators.”<sup>72</sup> In sum, in our practice we are participating in something greater than ourselves—sharing, one might say, in a higher law and striving to subordinate ourselves to it and give it temporal effect.

## VI.

Participation is a word that appeared several times in my exposition of Aquinas on the relation between eternal law and natural law. It is a concept that comes up on almost every page of Aquinas, though it is one he never, so far as I am aware, defines. Perhaps it was for him, and his world, too *everywhere*, if you will, to require definition. But what was everywhere for Aquinas is almost unthinkable by us. It refers to our sharing in what is higher and greater than we are, to our being not alone and isolated, but always already sharers in something more. A glimpse of what Aquinas means by “participation” emerges in this passage from his *De Hebdomadibus*: “Suppose we say that air participates the light of the sun, because it does not receive it in that clarity in which it is in the sun.”<sup>73</sup> As Eleonore Stump has explained the Thomistic teaching on participation as it pertains to law, “For a rational creature to participate in the eternal law is for it to have a share of the eternal divine reason and to have a natural

---

70. *Id.* at 253.

71. *Id.* at 5.

72. *Id.* at 200.

73. Thomas Aquinas, *De Hebdomadibus*, quoted in OWEN BARFIELD, *SAVING THE APPEARANCES: A STUDY IN IDOLATRY* 90 (Wesleyan Univ. Press 1988) (1965). The theme of the place of participation in Aquinas’s metaphysics of creation is developed in FRAN O’ROURKE, *PSEUDO-DIONYSIUS AND THE METAPHYSICS OF AQUINAS* (2005).

inclination to its own proper end.”<sup>74</sup> We participate in the eternal law, and it is thanks to this participation that we have a natural law that is a true law to live by.

In order to know the natural law, we need not know that it is a share in the eternal law; we need only know that the good is to be done and pursued and evil avoided—and what rational person does not know this? The more we know the natural law’s divine pedigree, though, the more reason we will have to obey it. But even without knowledge of the source of the law or light, there is a brightness not to be ignored—except at one’s peril. In explaining that the natural law is nothing but our participation of the eternal law, Aquinas begins with Psalm 4:

*The light of Thy countenance, O Lord, is signed upon us: thus implying that the light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing else than an imprint on us of the Divine light. It is therefore evident that the natural law is nothing else than the rational creature’s participation of the eternal law.*<sup>75</sup>

When understood as something exterior to man, “higher law” risks looking like a damnable intrusion. Legalism results when law is detached from what is good for those under the law; for Thomas, the natural law commands, but commands only what is good, and what is naturally apprehended as such. Understood as transcendent in its source but promulgated within the mind of the human person, natural law is true law to live by. Which is why Vining is also right that “[t]he question what the law ‘is’ is not so very different from the question what we ‘are’”<sup>76</sup>—unless of course we follow the post-realist realism of Justice Scalia and pretend that law is not, as Aquinas taught, something in the human mind, but is instead the text that just lies there, the “‘objectified’ intent,”<sup>77</sup> the black marks on a decaying page. Appearances need not be so thin, however. We might recognize that we are ruled not by texts but by persons, and above all the divine persons. (To be sure, such recognition will not be given in the idiom

---

74. ELEONORE STUMP, *AQUINAS* 88 (Routledge 2005) (2003).

75. *AQUINAS*, *supra* note 36, at q. 91, art. 2 c.

76. *VINING*, *supra* note 69, at 128.

77. *SCALIA*, *supra* note 22, at 17.



of “neutral public reason,” but that hardly counts as a dispositive blow against the possibility of it).<sup>78</sup>

---

78. Having developed in this paper a sketch of the Thomistic understanding of the natural law and some of its significance for the contemporary situation (because that was my assignment for the conference), I should add that public discourse about the “natural law” is, in the current historical situation, generally a bad idea. The concept is too freighted to be of much use, at least most of the time. Even in intramural Catholic discourse, Russell Hittinger explains:

The subject of natural law was placed in the most unfortunate position of being organized around two extreme poles. On the one end, it represented the conclusions of church authority; on the other, it represented what every agent is supposed to know according to what is first in cognition. We have Cartesian minds somehow under church discipline.

HITTINGER, *supra* note 45, at 21. Hittinger properly warns against “the impression that talk about natural law is a rhetoric designed to achieve consensus about matters of public policy, or, worse still, conclusions grounded in Church authority.” *Id.* at 16. This false and dangerous impression is avoided when one understands the natural law as true *law*, part of God’s providential governance of creation. And it is just such an understanding that is so scarce today, a problem, as I see it, for which there are no cheap fixes.