

# On Questions and Answers in *Law's Quandary*

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## TABLE OF CONTENTS

INTRODUCTION .....	85
I. ASKING THE RIGHT QUESTION .....	86
II. THE CLASSICAL VIEW OF LAW .....	89
CONCLUSION.....	96

## INTRODUCTION

In *Law's Quandary*,<sup>1</sup> Steven Smith focuses our attention on what legal discourse and legal practices seem simultaneously to suggest and to deny. He argues that our words and actions in this area assume a transcendent law with a divine author, a view that, he asserts, once dominated classical thinking about law, but which we now purport to reject. Smith further argues that the senselessness of much of our judicial and scholarly writing about law is due to this disconnect, or

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1. STEVEN D. SMITH, *LAW'S QUANDARY* (2004).

“gap,” between the “ontology” that our legal practices presuppose and the contrary, thinner metaphysical views we proclaim.<sup>2</sup>

This paper will explore a few central aspects of Smith’s fascinating and provocative argument. Part I considers the connection between Smith’s analysis and one standard Wittgensteinian argument about the causes of philosophical problems. Part II, starting from a different direction, explores the “classical” approach to law that Smith extols as superior to our own, raises some questions about Smith’s portrayal, and considers the extent to which his approach can provide better answers to the quandaries Smith discusses than does conventional modern legal thought.

## I. ASKING THE RIGHT QUESTION

In the first chapter of his book, *The Concept of Law*, H.L.A. Hart explores the fact that the question “What is law?” had become central to jurisprudential discussions, and the unusual responses and theoretical positions that this question seems to have provoked.<sup>3</sup> Following a roughly Wittgensteinian method of doing philosophy,<sup>4</sup> Hart notes the strangeness of the question, the even stranger answers it seems to provoke, and suggests that we focus instead on the underlying concerns that motivate the inquiry.<sup>5</sup>

Smith begins his book by avoiding Hart’s path away from the basic question of “what is law?” Smith invokes a fictional character asking lawyers to show her “the law,” and she objects when all she is shown are examples of legal texts and legal practices.<sup>6</sup>

Smith is well aware of the dangers here—that it may be a “category mistake” to ask to see, for example, “the university,” “the division,” or “team spirit” separate from their instantiations—and some might urge that Smith’s fictional interlocutor makes a similar mistake.<sup>7</sup> However, Smith notes that there are other occasions where asking these sorts of

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2. See generally *id.*

3. H.L.A. HART, *THE CONCEPT OF LAW* 1-17 (2d ed. 1994). Likely, I have a bias in discussing Smith’s book. After all, my work tends to be—or, more modestly and precisely, aspires to be—among the works that Smith dismissively rejects as the “meticulously ponderous successors” of Hart’s work. SMITH, *supra* note 1, at xi.

4. On the connection between Wittgenstein’s method and Hart’s analysis, see Brian Bix, *Questions in Legal Interpretation*, in *LAW AND INTERPRETATION* 137 (Andrei Marmor ed., 1995).

5. Smith, citing me, notes this tendency in Hart’s work. SMITH, *supra* note 1, at 3. Hart suggests that the concerns underlying the question “What is law?” are: “How does law differ from and how is it related to orders backed by threats? How does legal obligation differ from, and how is it related to, moral obligation? What are rules and to what extent is law an affair of rules?” HART, *supra* note 3, at 13.

6. SMITH, *supra* note 1, at 41.

7. *Id.* at 42.

question may not be a category error: for example, with “romantic love,” one can speak of its existence and identity separate from its manifestations.<sup>8</sup> And as Smith rightly observes,<sup>9</sup> Plato’s dialogues often involve Socrates challenging people to give definitions of key terms that go beyond pointing to their instantiations.

Nonetheless, on its own, searching for “the law” seems like the sort of error Wittgenstein warns us against: being misled by grammar, in particular, by assuming that nouns must refer to some object.<sup>10</sup> The Hartian version of Wittgenstein’s response still seems appropriate: that we would be well-advised to focus instead on the underlying concerns that would motivate such a strange question, rather than seek definitions or metaphysical responses.

To be fair, Smith’s inquiry is justified by more than the mere grammar of “the law.”<sup>11</sup> He discusses certain “quandaries” in our legal practices and shows how certain practices seem to assume a transcendent law: for example, the treatment of common law decisions as “evidence of . . . the law[]” rather than law itself;<sup>12</sup> the retroactive application of judicial

8. *Id.* at 43.

9. *Id.* at 17-19.

10. *See, e.g.*, LUDWIG WITGENSTEIN, *THE BLUE AND BROWN BOOKS* 1 (2d. ed. 1960).

The context of that quote is as follows:

What is the meaning of a word?

Let us attack this question by asking, first, what is an explanation of the meaning of a word; what does the explanation of a word look like?

The way this question helps us is analogous to the way the question “how do we measure a length?” helps us to understand the problem “what is length?”

The questions “What is length?” “What is meaning?” “What is the number one?” et cetera, produce in us a mental cramp. We feel that we can’t point to anything in reply to them and yet ought to point to something. (We are up against one of the great sources of philosophical bewilderment: a substantive makes us look for a thing that corresponds to it.)

*Id.*

11. And one cannot as easily “translate” into ontologically simple terms “the law says that *X*” as compared with, for example, “the White House today proclaimed . . .” or “IBM today purchased . . .”

12. Smith cites famous language from Justice Story in *Swift v. Tyson*. SMITH, *supra* note 1, at 46. It is important to understand the passage in its full context. Justice Story writes:

In the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the Courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect.

*Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842). First, it is important to understand that Justice Story makes this claim as part of a conclusion that the Judiciary Act of 1789,

decisions, even when they deal with issues of first impression or are decisions that seem to mark a significant change in the prior law; and the search for “the meaning” of statutes and constitutional provisions, even in situations where “plain meaning” and legislative history give little guidance.<sup>13</sup> And there are basic questions about the *sense* of legal propositions—what it is that makes them true or false—that may or may not require a richer ontological grounding than most of us profess or in which most of us believe.<sup>14</sup>

Yet one still leaves with the suspicion that Smith seeks quandaries where they may not exist. Again, in a Wittgensteinian vein, one might respond that our current practices work well on their own terms and require no further explanation.<sup>15</sup> Our current practices, and the continuing debates surrounding those practices,<sup>16</sup> do not seem either irrational or paradoxical—though they remain controversial and subject to arguments for reform—if we accept two ideas: (1) it is the task of officials to resolve disputes consistently with past official actions—statutes, constitutional provisions, and prior judicial resolutions of disputes; and (2) that our legal system and its officials should have the objectives of coherence, reason, or justice, with whatever ontological commitments these objectives bring.<sup>17</sup> There is, of course, room to argue about the fairest way to deal

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which requires federal courts to apply “the laws of the several states,” does not require those courts to follow state court common law decisions, as contrasted with state statutory law. *See id.* at 18-19. Second, Story’s description of how common law decisionmaking differs from statutory law seems, on its own, to be unexceptionable. Of course, the question remains of what is going on in common law decisionmaking, and whether it entails belief in “transcendent” law; it will be revisited, if briefly, below.

13. *E.g.*, SMITH, *supra* note 1, at 39-64.

14. Ronald Dworkin asserts the question as the basic one of the nature of legal sense: what it is that makes propositions about law, or within it, true or false. *See, e.g.*, Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 527 (1982). However, as Smith observes, SMITH, *supra* note 1, at 167, 200 n.37, Dworkin’s own work rejects the need for significant ontological grounding. *See, e.g.*, Ronald Dworkin, *Objectivity and Truth: You’d Better Believe It*, 25 PHIL. & PUB. AFF. 87 (1996).

15. A similar line of argument is offered, expertly and in greater detail, in Lloyd L. Weinreb, *Law’s Quest for Objectivity*, 55 CATH. U. L. REV. 711 (2006). For example, consider the following:

How, [Smith] asks, can we possibly know what the law is . . . . The uncomplicated, sensible answer is that we ascertain what the law is by doing all the things that lawyers and judges do: parsing a statute, reading judicial opinions, perhaps studying a treatise. Having done all that conscientiously, we are in a position to say what the law is. Why is that not enough?

*Id.* at 715.

16. These include, for example, ongoing disputes regarding horizontal precedent, the reference to legislative history in statutory interpretation, the proper approach to constitutional interpretation, et cetera.

17. Smith makes much of that most legal academic writing is silly or obscure and the fact that the discourse of lawyers and judges has its own faults. SMITH, *supra* note 1, at 6-8. The plagues of academic writing on one hand and professional discourse on the

with situations where the application of past judicial decisions or statutory language is unclear, both how to clarify ambiguous provisions<sup>18</sup> and when to make applications prospective only, but these are normative (moral, policy) debates that do not necessarily entail significant metaphysical/ontological grounding.<sup>19</sup> It is certainly open to Smith to argue that our current practices of statutory interpretation or common law decisionmaking are irrational or illegitimate.<sup>20</sup>

## II. THE CLASSICAL VIEW OF LAW

In contrast to our ontologically starved and legally confused modern times, Smith extols what he calls the “classical” response, which he associates primarily with the portrayal of law by Thomas Aquinas (circa 1225-1274), but which, he argues, continued through the common law

other are well-known, but are usually not seen to have been caused by ontological gaps or to require metaphysical cures; I would not mind, however, seeing Smith's sharp analytical mind let loose on English departments or business managerial jargon.

18. As Smith states, the courts would always have the option to simply state that there is no law on this subject, so some default applies—defendant wins in lawsuit, there is no criminal prohibition, et cetera. *Id.* at 150. However, while this may be a workable response for some circumstances—Justice Scalia expressed particular enthusiasm for it with constitutional provisions, *see* Antonin Scalia, *Law & Language*, 157 *FIRST THINGS* 37, 44 (2005) (reviewing *LAW'S QUANDARY*)—it can never be a complete answer. Vague borderlines themselves have vague borderlines: even assuming a presumption of liberty or an interpretive theory of lenity, the legal system would still have to apply decisions and legal language in circumstances of less than full clarity. *See* JOSEPH RAZ, *Legal Reasons, Sources, and Gaps*, in *THE AUTHORITY OF LAW* 73 (1979) (discussing the inevitability of “legal gaps”).

19. *Cf.* Weinreb, *supra* note 15, at 715 (“The gap that Professor Smith perceives is not ontological—the universe is not missing some furniture that ought to be there—but normative. It is a gap between the law's normative demands and its perceived lack of rational force.”).

20. It is important to recall that much of Dworkin's philosophical machinery in his theory of law is justified by just such concerns: that judicial decisions be, and be seen as being, based on past official actions rather than the retroactive application of newly legislated standards. *See, e.g.*, RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 14-15 (1977) [hereinafter *DWORKIN, RIGHTS*] (discussing “embarrassing questions” that sound similar to some of Smith's “quandaries”).

Also, while it is true that judges and lawyers act as if there were answers to questions not yet resolved by social sources, it is important to recall that it is not only law, and thus, not only areas of discourse with theological and ontologically rich traditions, where this is the case. As Dworkin has pointed out, we often speak as if and seem sincerely to believe that there are correct answers regarding aspects of the life and personality of fictional characters, whether from books, films, or television shows, beyond what is displayed in their tales. *See, e.g.*, RONALD DWORKIN, *A MATTER OF PRINCIPLE* 149 (1985).

views of later English jurists. Smith summarizes his understanding of the classical view as follows:

Law's ultimate author was God, whose providential plan for the cosmos constituted what Aquinas described as an "eternal law," and all law—human and divine—derived its legal character from that law. But what we would call "positive law" comes into being only as it is promulgated by human legislators. Moreover, very little of the detailed content of positive law can be "read off" of the eternal law; the content is given, rather, by the decisions of human legislators. So those mundane authors supply the substance of the law that serves, for example, the function of coordination. But the law is also connected to a higher or deeper source of meaning through its underlying, divine authorship.<sup>21</sup>

I want to look at Aquinas's view at somewhat greater length than Smith did. A key passage in Aquinas, cited and discussed briefly by Smith,<sup>22</sup> states:

Hence every human positive law has the nature of law to the extent that it is derived from the Natural Law. If, however, in some point it conflicts with the law of nature it will no longer be law but rather a perversion of law. . . .

However, it should be noted that there are two ways in which something can be derived from the Natural Law. The first way is as conclusions are derived from principles. The second way is through determination of certain generalities. . . .

. . . .  
. . . [B]oth are found in human Positive Law. But those things that are contained in human law, not as arising exclusively therefrom, have some force from the Natural Law as well. But those that are derived from the Natural Law in the second way have force exclusively from human laws.<sup>23</sup>

Aquinas later adds: "Positive human laws are either just or unjust. If they are just, they have the power of binding in conscience, a power which comes from the Eternal Law from which they are derived . . . ."<sup>24</sup> Aquinas concludes that, to unjust laws, "the order of power divinely conferred does not extend. Hence, in such matters, man is not bound to obey the law, if it can be resisted without scandal or greater harm."<sup>25</sup>

Without in any way denying or discounting the perspective of people who are comfortable with references to "Eternal Law" and "Natural Law,"<sup>26</sup> it is my opinion that these views can be, for our purposes,

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21. SMITH, *supra* note 1, at 152.

22. *Id.* at 46, 185.

23. SAINT THOMAS AQUINAS, THE TREATISE ON LAW 288 (R. J. Henle ed. & trans., 1993) (Q. 95, Art. 2, corpus).

24. *Id.* at 324. For Aquinas, a law is just if it is "ordered to the Common Good," does not exceed the lawmaker's authority, and imposes burdens in a proportionate way across the community. *Id.* at 325 (Q. 96, Art. 4, corpus).

25. *Id.* at 323 (Q. 96, Art. 4, Reply 3).

26. Aquinas discussed the relationship between the Eternal Law and the Natural Law as follows: "The Natural Law is nothing other than a participation in the Eternal Law by the rational creature." *Id.* at 160 (Q. 91, Art. 2, corpus); *see also* JOHN FINNIS,

translated into an idiom in which modern and secular readers will be more familiar:

- (1) *There are objective moral truths*, which some may call the “Natural Law”;
- (2) *Law should be consistent with moral truth*; the moral principles may sometimes leave only one possible legal rule, but on other occasions may allow a selection among equally legitimate legal rules;
- (3) *Legal rules that are consistent with morality create moral obligations*, or “bind in conscience”; those that are contrary to morality do not create moral obligations, though there may be an obligation on occasion to outwardly comply in order not to undermine a generally just legal system.

What are the problems of this “translation”? It certainly would not pick up a view Smith ascribes to some of the English jurists, that “Christianity was part of the common law.”<sup>27</sup> However, to the extent that this claim was meant to be taken as more than metaphorical, and to the extent that the claim means something more than that the common law incorporates general moral values affirmed by Christianity (and most other major religions and secular ethical systems), such as “murder is bad,” et cetera, this claim seems broadly and clearly untenable. Consider just a few standard tenets of English common law and see how well they fit with Christian religious or moral teaching: the absence of any affirmative duty to rescue, even when the rescue could be done with minimal risk to the potential rescuer;<sup>28</sup> the exemption of wives from the protection of rape laws;<sup>29</sup> the unenforceability of promises unsupported by consideration,<sup>30</sup> and so on.

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NATURAL LAW AND NATURAL RIGHTS 388-403 (1980) (discussing the relationship between Eternal Law and Natural Law). I should note that Patrick McKinley Brennan has offered a distinctly different reading of Aquinas on the Eternal Law in *Law, Natural Law, and Human Intelligence: Living the Correlation*, 55 CATH. U. L. REV. 731, 741-43 (2006).

27. SMITH, *supra* note 1, at 47.

28. See, e.g., Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980) (arguing against the current and long-established general common law principle of no duty to rescue).

29. See, e.g., Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373 (2000).

30. See, e.g., E. ALLAN FARNSWORTH, CONTRACTS § 2.5, at 53-54 (4th ed. 2004). As the Massachusetts Supreme Judicial Court wrote in the well-known case of *Mills v. Wyman*, in rejecting the argument that moral consideration would be sufficient to make a

Even Aquinas asserted the clear divergence between the content of law—descriptive or prescriptive—and the content of Christian teaching:

Now, human law is framed for the whole community of men in which most men are not perfect in virtue. And therefore human law does not prohibit all vices from which the virtuous abstain but only the more serious ones from which it is possible for the majority to abstain and especially those which are harmful to others and which, if not prohibited, would make the preservation of human society impossible: Thus human law prohibits murders, thefts, and the like.<sup>31</sup>

To return to the proffered “translation,” the translated text would seem neither especially controversial<sup>32</sup> nor necessarily to entail significant ontological commitments.<sup>33</sup>

Smith equates the classical view with an approach that equated “the law” with divine legislation. However, it is important to understand that there was always a tension within the Natural Law tradition between those who equated the Natural Law, or moral truth, with the will or command of God, and those who believed that the Natural Law was in principle independent of divine will, reflecting instead a rationally accessible order. Reaching back to the terms of Plato’s dialogue “Euthyphro,”<sup>34</sup> slightly modified in paraphrase, the question is whether something is good because and only because it is chosen by God, or is chosen by God because it is good, and thus its goodness can in principle be determined without reference to divine choice.<sup>35</sup> The view that emphasized divine will or command is known as *voluntarism*; the opposite view has gone

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promise enforceable, law quite consciously deviated from the standards set by (religious) morality:

A deliberate promise, in writing, made freely and without any mistake . . . cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it.

Mills v. Wyman, 20 Mass. (3 Pick.) 207, 211 (1825).

31. AQUINAS, *supra* note 23, at 316 (Q. 96, Art. 2, corpus).

32. Though, of course, not everyone would agree with every detail of those propositions. For example, some prominent theorists doubt that legal rules, even when consistent with moral truth, always or necessarily create a moral obligation to obey. See, e.g., JOSEPH RAZ, *The Obligation to Obey: Revision and Tradition*, in ETHICS IN THE PUBLIC DOMAIN 325 (1994) (arguing against a general moral obligation to obey the law).

33. The metaphysical and ontological grounding needed for moral systems is, of course, itself a highly controversial topic within moral philosophy and theology, and one need only note that many prominent moral systems are not grounded on divine command or otherwise dependent upon or entail the existence of God.

34. PLATO, *Euthyphro*, in THE COLLECTED DIALOGUES OF PLATO 178 (Edith Hamilton & Huntington Cairns eds., Lane Cooper trans., 1961).

35. For the purpose of these alternatives, one might accept that the Good does not have that quality simply because it is chosen by God, and that the Good is in principle identifiable even without reference to divine command, but still believe that divine command is significant on the basis that God is a more reliable, less fallible guide to finding the Good than are human reasoning and judgment.

under a number of labels, including *intellectualism* and *rationalism*.<sup>36</sup> The simple point here is that not everyone in classical times equated Natural Law, or any other version of the “higher law,” simply with divine will or command.<sup>37</sup>

One should probably not make too much of this clarification. After all, if one accepts objective moral truth—perhaps related to a normatively charged world, even if not simply equated with a divine plan or a series of divine commands—and the idea that positive human law is “a participation in” or an aspiration towards that moral truth, this may serve the purposes of Smith’s argument at least as well as any voluntarist Natural Law view. We need to separate out two claims:

- (1) that there are, or that we think or assume that there are, legal rules—or at least the answers to some legal disputes—that are already present prior to any official action regarding those disputes; and
- (2) that this preexisting law is some divine command, promulgation, or plan.

We also need to consider the consequences of accepting either or both of the above propositions. Smith spends so much time questioning current practices—always asking the right questions and in the most incisive way—that he leaves himself little time to consider whether his alternative view, the classical view, characterizes and explains our practices any better than the conventional views. To the extent that he considers the question, Smith is surprisingly cautious and careful to hedge: belief in the classical account “*might*” help fill the gaps in our legal discourse and practice, but, he quickly adds, “from our vantage point it is hard to say.”<sup>38</sup>

Nevertheless, *Law's Quandary* clearly leaves readers with strong hints that a return to classical ontology and religious thinking will both explain and ground our practices and our discourse, even if the book

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36. See, e.g., J. B. SCHNEEWIND, *THE INVENTION OF AUTONOMY* 17-36 (1998); Mark C. Murphy, *Theological Voluntarism*, in *STAN. ENCYCLOPEDIA OF PHIL.* (2002), <http://plato.stanford.edu/archives/fall2002/entries/voluntarism-theological> (last visited Mar. 9, 2007).

37. And this, of course, remains true also for modern writers within the Natural Law tradition. See, e.g., John Finnis, *On the Incoherence of Legal Positivism*, 75 *NOTRE DAME L. REV.* 1597, 1598-1600 (2000) (criticizing voluntarism in the Natural Law tradition).

38. SMITH, *supra* note 1, at 155; see also *id.* at 99.

never gets past insinuation.<sup>39</sup> Perhaps it is for the next book.<sup>40</sup> However, if a turn to the classical view would provide less of a solution than the book insinuates, this might bring a different light to the “quandaries” Smith presents.

For example, say that one believes that: (1) there is Eternal Law and Natural Law; (2) positive law is only law, or “law in its fullest sense,”<sup>41</sup> to the extent that it derives from and is consistent with the Eternal Law and Natural Law; and (3) that, as Aquinas, Finnis, and others argued, the creation of positive law may also involve *determinatio*,<sup>42</sup> that is, making general principles more precise or choosing among equally legitimate alternatives. One might ask, in what way would this picture solve the problem of, say, the rhetoric of judges discovering, rather than creating, the law,<sup>43</sup> or the retroactive application of legal decisions?<sup>44</sup> If some of those decisions are *determinationes*, and many likely are, then under Smith’s system these decisions do not reflect law that was “already in existence.”<sup>45</sup>

And what of the problem with statutes? Would a classical view of law help justify the courts who tell us that they have discovered, for example, what the Sherman Act “really means” regarding some difficult and highly contested question of antitrust law?<sup>46</sup> If we thought that the statute aspired towards some moral ideal or divine code,<sup>47</sup> judges might use that ideal or code to fill the gaps in the law and clarify its uncertainties. Note, though, that, as earlier suggested, one might easily have the same approach to judging without making significant metaphysical/ontological commitments.

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39. Cf. Scalia, *supra* note 18, at 45-46 (noting Smith’s strong hints regarding a religious answer, but his seeming hesitation to advocate it).

40. One is reminded of another prominent theorist who called upon a divine response to solve problems his theory raised. See ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS 295 (1975) (“Speak, God.”).

41. See FINNIS, *supra* note 26, at 363-66.

42. On *determinatio*, see *id.* at 284-89; JOHN FINNIS, AQUINAS 266-74 (1998).

43. SMITH, *supra* note 1, at 56-58.

44. *Id.* at 61-62.

45. Instead, we might be pushed in the direction of Ronald Dworkin’s work; Dworkin has, throughout his writings, tried to show why judicial decisions are and should be based on preexisting right answers to legal disputes. See, e.g., DWORKIN, RIGHTS, *supra* note 20, at 119-45. And, of course, he does it with little to no metaphysical or ontological machinery. See, e.g., Dworkin, *supra* note 14, at 99-105 (deflecting metaphysics-based objections to the idea of objective moral truth).

46. SMITH, *supra* note 1, at 148.

47. Smith is careful to deny, and not to ascribe to other thinkers, the view “that there is, say, a sort of ghostly Internal Revenue Code in all of its magnificent detail written in the heavens, and that the Code we find in our more terrestrial tax volumes is merely a mundane photocopy of the celestial original.” *Id.* at 47.

However, if one's considered opinion was that the statute in fact was either a *determinatio* or an action inconsistent with the Natural Law, it is far from obvious how belief in Natural Law would support the task of determining "what the statute really means." Though in the second case, involving an unjust law, belief in Natural Law, or another system grounding objective moral truths, might guide the judges for the different, but still difficult, practical question of what they should do in the face of an unjust law.<sup>48</sup>

What of the various paradoxes of precedent? Michael Moore has shown how belief in metaphysical realism might alter somewhat our view of what judges are doing and should be doing in common law decisionmaking.<sup>49</sup> As Moore points out, a grounding in some form of metaphysical realism resolves some apparent paradoxes of precedent and common law reasoning, without resolving all of them.<sup>50</sup> Under this approach, prior case law would be seen as attempts to pick out the correct moral kind for each set of facts; any particular decision could thus be seen as "evidence of the law" rather than the law itself, in the sense that the law is aspiring to the moral truth.<sup>51</sup> However, Moore concedes that courts would sometimes have to deviate from what morality requires in recognition of the institutional fact that other judges, perhaps higher in the judicial hierarchy, may have decided disputes in the same category differently—that is, wrongly.<sup>52</sup> The basic tensions between "getting it right" and institutional/hierarchical discipline, and between optimal decisions in the present case versus the optimal rule for future cases,<sup>53</sup> seem intrinsic to the process.<sup>54</sup> And this still leaves

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48. See, e.g., FINNIS, *supra* note 26, at 351-68 (discussing a Natural Law response to unjust laws for citizens and judges).

49. See Michael S. Moore, *Precedent, Induction, and Ethical Generalization*, in PRECEDENT IN LAW 183 (Laurence Goldstein ed., 1987).

50. *Id.* at 196-210.

51. *Id.* at 208-10.

52. *Id.* at 210 ("[S]ome very important bits of institutional history . . . may divert the common law considerably from what would be morally ideal.").

53. See, e.g., Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 588-91 (1987) (discussing the suboptimal decisionmaking for individual cases entailed by precedential decisionmaking).

54. However, these conflicting goals and values do not necessarily mean that precedential decisionmaking is inferior to codification; there is much to be said for the relative flexibility of precedent. See *generally id.* That, though, is an argument for another day.

untouched the problem of retroactive elements in the application of judicial decisions.

#### CONCLUSION

*Law's Quandary* is that wonderful and rare combination in modern legal scholarship: a book that is simultaneously fresh, clearly written, thoughtful, incisive, and mercifully short. So it is perhaps both unwise and unfair of me to wish that it had been longer.<sup>55</sup> At the same time, the text, in its current short form, leaves the reader frustrated by hinting at an answer to the quandaries raised without fully articulating that answer, and by leaving at least this reader with the suspicion that the implied answer might not resolve the quandaries. If the last is true, we are left with dissolving the quandaries, as I suggest in Part I, or seeking a completely different source for our response to the problems of law.

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55. Though, as an author of articles and books myself, I know how rare it is for a reader to ask for an academic work to be longer.